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Supreme Court, U.S.
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In The
Supreme Court of the United States

OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C.
d/b/a CANCER CARE ASSOCIATES,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS,

Respondent,

JPMORGAN CHASE BANK OF TEXAS, et al.,

Real Parties in Interest.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's decision in *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955 (2007), apply to jurisdictional fact allegations under scrutiny in a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction?

2. Does a district court have discretion to decline consideration of a factual challenge to the existence of subject matter jurisdiction and instead, rely solely on the allegations of the complaint?

3. When an arbitration agreement contains an exclusive forum and venue provision, does 9 U.S.C. §4 limit a federal district court outside the contract venue from ordering arbitration to take place in that forum and outside its district?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner **Oklahoma Oncology & Hematology P.C. d/b/a Cancer Care Associates** is an Interpleader Defendant in the underlying district court case below, and was the petitioner in the mandamus proceedings before the court of appeals.

Real party in interest **JPMorgan Chase Bank, N.A.** is the Interpleader Plaintiff in the underlying district court case below and was a respondent in the mandamus proceedings before the court of appeals.

Real party in interest **AOR Management Company of Oklahoma, Inc.** is an Interpleader Defendant in the underlying district court case below and was a respondent in the mandamus proceedings before the court of appeals.

Real party in interest **US Oncology, Inc.,** is an Interpleader Defendant in the underlying district court case below and was a respondent in the mandamus proceedings before the court of appeals.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6, Petitioner hereby submits the following corporate disclosures:

Oklahoma Oncology & Hematology P.C. d/b/a Cancer Care Associates is an Oklahoma professional corporation. It has no parent corporation and is not a publicly traded company.

JPMorgan Chase Bank, N.A. is a national banking association. The association holding company is JPMorgan Chase & Company which is publicly traded (NYSE: JPM) and utilizes the "brands" JPMorgan Chase, JPMorgan, and Chase.

AOR Management Company of Oklahoma, Inc. is a Delaware corporation with its principal place of business in Oklahoma. It is not a publicly traded company, and is a wholly owned subsidiary of US Oncology, Inc.

US Oncology, Inc. is a Delaware corporation with its principal place of business in Texas. US Oncology, Inc. is a wholly owned subsidiary of US Oncology Holdings, Inc. which is not a publicly traded company. As of December 22, 2006, Morgan Stanley Strategic Investments, Inc. owned 14.7 percent of the common stock of US Oncology Holdings, Inc. Public records indicate that all or nearly all of the remaining stock is owned by Welsh Carson Anderson & Stowe, a New York based private equity firm.

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PETITION FOR WRIT OF CERTIORARI

Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates ("CCA") respectfully petitions for a writ of certiorari to review the orders of the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of Texas in this case.

OPINIONS BELOW

The court of appeals order denying CCA's Petition for Writ of Mandamus is attached at Pet. App. 1. The district court orders that are the subject of CCA's Petition for Writ of Mandamus are attached at Pet. App. 2 and 23, respectively. The decision of the Oklahoma Supreme Court in a related proceeding (Pet. App. 155) is reported at 160 P.3d 936 (Okla. 2007).

JURISDICTION

The district court orders were entered on February 26, 2007, and May 11, 2007, respectively. The court of appeals entered its order denying CCA's Petition for Writ of Mandamus on June 20, 2007. An out-of-time petition for rehearing *en banc*, filed with leave of the court of appeals, was denied on July 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Federal interpleader jurisdiction, 28 U.S.C. §1335, is set forth at Pet. App. 35-36. The Federal Arbitration Act, 9 U.S.C. §§3, 4, are set forth at Pet. App. 37.

PRELIMINARY STATEMENT

Interpleader Plaintiff JPMorgan Chase Bank of Texas, N.A. ("Chase") filed this suit in the United States District Court for the Southern District of Texas under the federal interpleader statute, 28 U.S.C. §1335, to resolve competing claims to funds in a Chase lockbox bank account (the "CCA Account"). Although the Complaint with attached documents reflects the existence of only two legitimate, non-diverse claims to the interpleader fund, Chase invoked the jurisdiction of the federal courts alleging a reasonable fear of multiple liability from three assertedly adverse, diverse claimants.

Two of the adverse claimants, CCA and AOR-OK Management Company of Oklahoma ("AOR-OK"), are residents of the state of Oklahoma. Federal subject matter jurisdiction would not exist if these two were the only claimants in this action. Jurisdiction is only present if US Oncology, Inc. ("USON"), the third interpleader defendant and a resident of the states of Texas and Delaware, states a legitimate claim to the fund and is not a resident of the state of Oklahoma.

CCA challenges the exercise of subject matter jurisdiction in this case because the complaint on its face does not allege a plausible claim warranting the inclusion of USON as a party. CCA also makes a factual challenge to the existence of subject matter jurisdiction, alleging that USON is the alter ego of AOR-OK and should be imputed Oklahoma residency for purposes of diversity citizenship. CCA has also factually attacked the existence of subject matter jurisdiction on the grounds that Chase has not deposited the full fund as the interpleader statute requires for the exercise of jurisdiction, and because Chase's "unclean hands" preclude it from seeking equitable relief in the federal courts.

Without citing any legal or factual basis, the district court concluded that USON alleged a "colorable" claim to the fund independent of AOR-OK. The district court then declined to consider CCA's factual challenge based on the findings that the factual attack was "intertwined" with the merits of the case, that the alter ego allegation was "not relevant" to its jurisdictional analysis, and that Chase met its jurisdictional obligation to deposit the full fund.

In its order denying the Rule 12(b)(1) motion to dismiss, the district court reinstated its prior order compelling the parties to commence arbitration proceedings under an arbitration agreement that specified Tulsa, Oklahoma, as the exclusive forum for any litigation or arbitration proceedings.

Because the district court's analysis was so flawed as to constitute an overreaching of its statutory authority and a failure to perform its duty to evaluate its subject matter jurisdiction, CCA filed a petition for writ of mandamus in the Fifth Circuit Court of Appeals on June 1, 2007. In a one line opinion and order, the Fifth Circuit denied the petition on June 20, 2007. The Fifth Circuit then denied CCA's petition for rehearing *en banc* in similar fashion on July 17, 2007.

CCA petitions for certiorari to determine whether this Court's decision in *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955 (2007), should be applied to jurisdictional fact allegations under scrutiny in a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Although the *Bell Atlantic* decision involved the interplay between Rule 8 and Rule 12(b)(6), factual allegations relevant to any Rule 12 motion to dismiss should also be analyzed under the same standard.

CCA also seeks this review to resolve a circuit split regarding whether a district court has discretion to decline consideration, at the time a jurisdictional challenge is made, of a factual challenge to the existence of subject matter jurisdiction. A number of circuit courts, including the Fifth Circuit, have interpreted this Court's precedent in a manner that suggests that federal courts can decline to consider all evidence supporting factual challenges to the existence of subject matter jurisdiction. CCA respectfully contends that federal district courts must disregard

presumptions in favor of jurisdiction, and instead evaluate the proof offered in connection with a factual challenge to the existence of subject matter jurisdiction.

Finally, CCA seeks review to resolve a circuit split as to whether the FAA authorizes federal district courts to compel arbitration when the applicable arbitration agreement contains an exclusive venue provision in a locale outside of the district. A majority of circuit courts have concluded that under such circumstances, 9 U.S.C. §4 prohibits a district court from ordering arbitration to take place within or outside of its district. The appropriate remedy is either a transfer of venue or a stay of proceedings pending arbitration as permitted under 9 U.S.C. §3. CCA requests that the Court resolve the circuit split in a manner consistent with the holdings of the Third, Sixth, Seventh and Tenth Circuit Courts of Appeals.

STATEMENT OF THE CASE

A. The Complaint.

Cancer Care Associates is an Oklahoma professional corporation formed for and engaged in the conduct of a medical practice and the provision of medical services to the general public exclusively in and around metropolitan areas of the state of Oklahoma, including Tulsa, Oklahoma City, Bartlesville, and Stillwater.

AOR-OK is a Delaware corporation with its principal place of business in Tulsa, Oklahoma.[1] AOR-OK is the successor-in-interest to Oncology & Hematology Management Partnership, which began serving as CCA's "Business Manager" in 1995 with responsibility to provide such management, administrative and business services as were necessary and appropriate for the day-to-day administration of the nonmedical aspects of CCA's medical practice in the state of Oklahoma pursuant to a Management Services Agreement ("MSA").

Disputes arose between CCA and AOR-OK regarding the parties' respective obligations under the MSA, resulting in the 2005 filing of a state court lawsuit in Tulsa, Oklahoma, and a demand for arbitration. An interlocutory appeal to the Oklahoma Supreme Court followed, wherein that court reversed a state trial court order compelling arbitration and remanded for further consideration. Pet. App. 155. That case is currently proceeding in the Tulsa state trial court.

The dispute before the Court centers on one aspect of the MSA, the receipt, collection and payment of CCA receivables which at all relevant times were delivered and deposited into the CCA Account or, as alleged by CCA, received by Chase and diverted

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[1] Although the complaint asserts that AOR-OK has Texas residency, AOR-OK admitted in its answer and other pleadings that it is a resident of the state of Oklahoma. Pet. App. 27, n.10.

into a USON account. As the interpleader fund constitutes checks made payable to CCA for medical services rendered by CCA physicians, CCA naturally claims that it owns the fund. AOR-OK, meanwhile, contends that it has purchased (and therefore, owns) the receivables because it performed services and exercised its contractual right to purchase such receivables under the MSA.

USON is a Delaware corporation with its principal place of business in Texas. Other than a reference to the fact that it is the parent corporation of AOR-OK, USON is not mentioned in the first ten paragraphs of Chase's sixteen paragraph interpleader complaint. USON is not a party to the MSA, which is the sole document attached to the Complaint that arguably provides a contractual right to purchase CCA's receivables. Additionally, none of the documents attached to the complaint indicate that USON has any ownership interest in the CCA Account or the funds located therein. In fact, in paragraph thirteen Chase specifically refers to counsel for USON and AOR-OK's objection to "actions taken *to deny AOR-OK* access to the [CCA] Account." (Emphasis added.)

Later in paragraph thirteen, Chase states that "USON and AOR-OK claim an ownership interest in at least a portion of the funds in the Account to the extent that (1) they are forced to pay Oklahoma Oncology's operational and practice expenses out of pocket, and (2) the funds constitute receivables purchased from Oklahoma Oncology." However, no

statement in the Complaint articulates an independent claim by USON that is adverse to AOR-OK.

Chase's complaint states three claims to the fund: (1) that CCA owns the funds in the Account, since they constitute CCA's receivables and CCA is the owner of the Account; (2) that *either* USON or AOR-OK purchased the funds pursuant to the MSA, a contract executed by AOR-OK and CCA and attached to the Complaint; and (3) that *either* USON or AOR-OK owns the receivables *to the extent* they are forced to pay CCA's expenses out of pocket.

Neither of the first two claims credibly belongs to USON, since it is not a signatory either to the CCA Account or the MSA. Inferentially, therefore, the sole "claim" USON can assert is that USON owns CCA's receivables to the extent it was "forced" to pay CCA's operational and practice expenses out of pocket. It is this claim that lacks explanation. The complaint neither cites nor explains any legally or contractually plausible basis for USON's claim of ownership based on this assertion. Nor does the complaint cite or refer to any probability that such advances have or will have actually occurred, and certainly not to the extent of the funds deposited into the registry of the Court.

Despite providing no authority for the conclusion that USON's claim has any contractual, legal or factual basis, Chase goes on to state that it "is in the position of an innocent stakeholder having a reasonable doubt as to which claimant is entitled to the

funds in the CCA Account and is faced with the possibility of multiple liability and incidental costs." On this basis, Chase invoked federal jurisdiction and interplead the stake into the registry of the Southern District of Texas.

B. CCA's Motion to Dismiss and the District Court Orders.

On or about March 10, 2007, CCA filed a motion to dismiss the complaint for lack of subject matter jurisdiction.[2] In its brief in support, CCA asserted both facial and factual challenges to the existence of subject matter jurisdiction. In its facial attack, CCA alleged that the court lacked jurisdiction because Chase had not shown a reasonable fear of liability from USON, whose inclusion was necessary to establish diversity since both AOR-OK and CCA were residents of the state of Oklahoma. In its factual attack on the existence of subject matter jurisdiction, CCA argued (1) that minimal diversity was lacking because USON and AOR-OK were alter egos (and therefore, USON was imputed Oklahoma citizenship); (2) that Chase failed to deposit the entire fund as required by the federal interpleader statute; and (3) that Chase could not invoke the jurisdiction of the

[2] Before filing its motion to dismiss, CCA moved for limited jurisdictional discovery and a hearing relating to its anticipated factual challenges. Chase, USON and AOR-OK all opposed the request, and the Court had not ruled on the motion as of the date CCA filed its Rule 12(b)(1) motion to dismiss.

district court because Chase did not have "clean hands" as required for a suit in equity such as interpleader.

Along with its motion to dismiss and brief in support, CCA offered numerous affidavits and other documentary evidence factually challenging the existence of subject matter jurisdiction. By contrast, Chase filed a brief in opposition to the motion to dismiss but did not include any evidence affirmatively supporting its factual allegations or rebutting CCA's evidence. AOR-OK and USON filed a separate, joint brief in opposition to the motion to dismiss and also did not provide the court with any evidence supporting Chase's jurisdictional allegations or challenging CCA's evidence. Therefore, at the time the district court ruled on the motion to dismiss, CCA's affidavits and documents were the only evidence in the record on the factual issues raised in the motion to dismiss.

On CCA's facial attack, the district court found the existence of subject matter jurisdiction based on its characterization of USON's claim as follows:

> USON alleges that it, not AOR-OK, made advances to pay CCA's expenses and/or purchased CCA's receivables. The court is therefore satisfied that Chase has demonstrated that USON has a "colorable claim" that creates a legitimate fear of multiple vexation against the [CCA] Account.

Pet. App. 29. The district court cited a pleading filed by USON and AOR-OK after suit was filed to reach this conclusion. However, the district court *did not* rely on the complaint or any other Chase pleading to determine the legitimacy of Chase's claim of "multiple vexation" from USON. Specifically, the district court failed to consider the fact that five days prior to the filing of Chase's complaint, AOR-OK (through its joint USON counsel)[3] made the assertion in the Tulsa state court proceeding that it alone advanced funds and purchased CCA's receivables:

> 7. To fund these expenses, the MSA provides that AOR-OK **may**, but is not obligated to, purchase CCA's accounts receivable on an ongoing basis. . . . Thus, the parties agreement contemplates that AOR-OK might purchase CCA's accounts receivable as a cash management tool to assist CCA in timely paying its expenses.
>
> 8. For nearly 11 years, . . . AOR-OK has used that tool and purchased all of CCA's accounts receivable by advancing funds to pay CCA's Office Expenses. . . .

[3] That USON and AOR-OK have the same counsel and have only filed joint pleadings in the case is proof enough that their claims are not "adverse." Plainly, the cannons of ethics would otherwise prohibit such joint representation. Indeed, after the district court compelled arbitration, USON and AOR-OK filed a joint arbitration demand for the interpleader fund. Pet. App. 40.

> As of February 13, 2006, AOR-OK has purchased, but not yet collected, approximately $24,500,000 of CCA's accounts receivable in this fashion.

Chase clearly had access to these allegations, since Chase itself filed AOR-OK's pleading containing these statements as an attachment to another pleading in the Texas federal district court.[4]

CCA's factual attack was also resolved without any consideration or evaluation of the evidence relating to the challenge. The district court first concluded it had no obligation to consider any factual attack that was "dependent upon whether the claim for relief is meritorious." The district court then found that whether or not USON and AOR-OK were alter egos "was not relevant to [its] jurisdictional analysis." Finally, the district court addressed CCA's fund argument by finding that Chase had deposited, or was in the process of depositing, all funds in the CCA Account into the registry of the court.

Finding subject matter jurisdiction, the district court then denied CCA's previously filed motion for jurisdictional discovery and hearing as moot. The district court also reinstituted its prior order compelling arbitration, which is attached at Pet. App. 2. In

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[4] *See* JPMorgan Chase Bank's Emergency Motion to Enjoin State Court Action Pursuant to 28 U.S.C. §2361 and Memorandum of Law in Support, filed April 10, 2006, District Court Docket #19. Although this document is not included in the Appendix, it is available on request.

the Order Compelling Arbitration, the district court (1) denied CCA's motion to transfer venue to the Northern District of Oklahoma; (2) denied CCA's motion to stay proceedings pending resolution in the state courts of Oklahoma, and (3) granted USON and AOR-OK's motion to compel arbitration. The court further ordered that USON and AOR-OK commence arbitration proceedings consistent with the MSA's arbitration provision, which stipulated that any arbitration proceedings must take place in Tulsa, Oklahoma.

C. CCA's Petition for Writ of Mandamus in the Fifth Circuit.

Believing the district court's analysis to be so fundamentally flawed as to constitute a departure from and failure to perform its obligation to determine the existence of subject matter jurisdiction, CCA filed a petition for writ of mandamus in the Fifth Circuit on June 1, 2007.[5] On June 4, a panel of the Fifth Circuit requested that Chase file a response to the mandamus petition. Chase, USON and AOR-OK subsequently filed responses on June 18, 2007. On June 20, 2007, the assigned panel summarily denied

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[5] While the Petition for Writ of Mandamus was pending and in an abundance of caution, CCA filed an interlocutory notice of appeal of the district court's orders regarding subject matter jurisdiction and arbitration. The Fifth Circuit granted Chase's motion to dismiss for lack of appellate jurisdiction on October 10, 2007.

CCA's petition without indicating its basis for doing so.

With leave of the Fifth Circuit, CCA filed a petition for rehearing *en banc* on July 6, 2007. The Fifth Circuit denied the petition for rehearing *en banc* on July 17, 2007, again without indicating its basis for doing so.

The Fifth Circuit's refusal to issue the writ of mandamus essentially sanctions the district court's departure from its legal obligation to properly assess the existence of subject matter jurisdiction immediately, once it is raised. The Fifth Circuit's refusal to issue the writ also sanctions the district court's exercise of jurisdiction beyond its FAA mandated powers. Accordingly, CCA now files this petition for writ of certiorari respectfully requesting the exercise of this Court's supervisory power over the lower courts.

REASONS WHY THE WRIT SHOULD ISSUE

I. The District Court Did Not Apply Proper Legal Standards to CCA's Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Over seventy years ago, this Court in *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178 (1936), articulated the standards for considering

challenges to the existence of subject matter jurisdiction:

> The prerequisites to the exercise of jurisdiction are specifically defined. . . . They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. **He must allege in his pleading the facts essential to show jurisdiction.** If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. . . . **If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.**

McNutt, 298 U.S. at 189 (emphasis added); *see also KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278-79 (1936).

As *McNutt* reflects, challenges to subject matter jurisdiction can be classified as "facial" (the plead facts do not support jurisdiction) or "factual" (the plead facts are not supported by adequate proof).

The district court's order denying CCA's motion to dismiss misperceives the legal standards for both types of jurisdictional challenges. CCA petitions for a writ of certiorari so that this Court can give the lower courts guidance on the proper legal standards to apply when presented with both facial and factual challenges to the existence of subject matter jurisdiction.

A. Rule 8 Pleading Standards Apply to a Facial Challenge to the Existence of Subject Matter Jurisdiction.

In *Bell Atlantic*, this Court considered Federal Rule of Civil Procedure 8's pleading requirements in the context of a Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief could be granted. For the past 50 years, Rule 8 had been interpreted to mean that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41 (1957).

This Court stated that the above-quoted phrase "has earned its retirement," clarifying that it is not the duty of the courts to imagine a set of circumstances that theoretically could entitle a plaintiff to relief. *Bell Atlantic*, 127 S.Ct. at 1969. *Bell Atlantic* replaced the *Conley* standard with the following: "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations of the complaint." *Id.* at 1969. In other words, a plaintiff cannot simply parrot the elements of a claim to initiate a "conceivable" cause of action – the plaintiff must allege facts that makes its factual/legal conclusions plausible. *Id.* at 1965-66.

Rule 12(b)(6) standards have long been applied to legal (*i.e.*, facial) challenges to the existence of subject matter jurisdiction under Rule 12(b)(1). *See Osborn v. U.S.*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). As such,

Rule 8 requires a plaintiff in a facial challenge to show that its alleged facts are sufficient to make its jurisdictional allegations plausible. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990) (stating that a "facial attack requires the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion") (internal citations omitted).

Bell Atlantic involved a complaint that on its face did not plausibly state a claim under substantive antitrust law. Just as the Sherman Act limits the kinds of "parallel conduct" that leads to an inference of anticompetitive behavior, so do the federal statutes limit the types of allegations necessary to confer subject matter jurisdiction over a dispute.

Of particular relevance here, Title 28 U.S.C. §1335, states:

> (a) The district courts shall have original jurisdiction of any civil action of interpleader . . . filed by any corporation . . . having in . . . its custody or possession money or property of the value of $500 or more, . . . **if**
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> (1) Two or more adverse claimants, of diverse citizenship . . . are claiming or may claim to be entitled to such money . . . and if (2) the plaintiff has deposited such money . . . into the registry of the

> court, there to abide the judgment of the court. . . .
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> (b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

The statute reflects that the existence of multiple claims or claimants to a fund, by itself, is not a sufficient factual allegation to create Section 1335 subject matter jurisdiction. Rather, only those claims exceeding $500 between adverse, diverse claimants that give the plaintiff a reasonable fear of multiple liability may be brought into a federal district court for resolution. 28 U.S.C. §1335; 7 Charles A. Wright, et al., *Federal Practice and Procedure* §1704 (3d ed. 2001) ("The primary test for determining the propriety of interpleading the adverse claimants . . . is whether the stakeholder legitimately fears multiple vexation directed against a single fund.").

That the respective claims must be legitimately "adverse" to each other is not a new requirement of interpleader law. In some form since the original statute was signed into law in 1917, federal interpleader has only been permissible where two or more "bona fide" claimants make claims to the fund. 7 Charles A. Wright, et al., *Federal Practice and Procedure* §1701 (3d ed. 2001) (citing *Aetna Life Ins. Co. v. Mason*, 30 F.2d 715 (D.C.N.J. 1929)).

While the statutory language has changed over the years, it remains that an interpleader plaintiff cannot invoke federal jurisdiction merely by alleging the existence of multiple claims. "Because the sole basis for equitable relief to the stakeholder is the danger of exposure to double liability or the vexation from conflicting claims, [] the stakeholder must have a real and reasonable fear of double liability or vexatious, conflicting claims to justify interpleader." *Indianapolis Colts v. Mayor and City Council of Baltimore*, 741 F.2d 954, 957 (7th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); (citing *Fonseca v. Regan*, 734 F.2d 944 (2d Cir. 1984); *Bass v. Federal Sav. & Loan Ins. Corp.*, 698 F.2d 328 (7th Cir. 1983); *Dunbar v. United States*, 502 F.2d 506 (5th Cir. 1974); *General Electric Credit Corp. v. Grubbs*, 447 F.2d 286 (5th Cir. 1971), *rev'd on other grounds*, 405 U.S. 699 (1972); *Francis I. DuPont & Co. v. O'Keefe*, 365 F.2d 141 (7th Cir. 1966); *Bieman v. Marcus*, 246 F.2d 200 (3rd Cir. 1957), *cert. denied*, 356 U.S. 933 (1958); *New York Life Ins. Co. v. Lee*, 232 F.2d 811 (9th Cir. 1956); *John Hancock Mut. Life Ins. Co. v. Beardslee*, 216 F.2d 457 (7th Cir. 1954), *cert. denied*, 348 U.S. 964 (1955); and *American Fidelity Fire Ins. Co. v. Construcciones Werl, Inc.*, 407 F. Supp. 164 (D.V.I. 1975)).

The failure here is that Chase plead no facts legitimizing its fear of liability to the diverse claimant, USON. Chase states no contractual basis to make plausible the claim that USON purchased CCA's receivables, or even had a contractual right to do so. Chase fails to state any facts supporting its

"belief" that USON was actually forced to advance funds on behalf of CCA for which it was not paid; it simply alleges the possibility that this may occur in the future. Finally, Chase cites no legal authority for the proposition that a non-contractual, voluntary advance of expenses to a company can result in ownership of specific assets of the company.[6]

Despite its repeated characterization as such, CCA's facial challenge does not go to the merits of USON's claim to the fund. To ask that USON state a cognizable legal or factual basis for a claim is not the same as a request to assess whether such claim is more or less viable than other claims to the fund.

The pleading failure here is substantive, not simply procedural. Federal law does not permit a bank to tie up millions of dollars in an account simply because someone makes an unsubstantiated claim on those funds. Rule 8 standards, as defined in *Bell Atlantic*, are consistent with the substantive interpleader law requirement that "the district court should look closely at the bona fides of both the stakeholder's alleged interest and the threat of multiple vexation to ensure that they have not been manufactured to obtain" the benefits of the federal

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[6] At the time it filed the interpleader, Chase was aware that USON was not a party to the MSA – and therefore could not have claimed to have directly purchased the receivables under that contract. Moreover, Chase has always been aware that USON is neither an owner nor an authorized representative of the CCA Account.

interpleader statute. 7 Charles A. Wright, *Federal Practice and Procedure* §1710 (3d ed. 2001).

B. A Circuit Split Exists on the Legal Standards Applicable to a Factual Challenge to the Existence of Subject Matter Jurisdiction.

"If the Rule 12(b)(1) motion denies or controverts the pleader's allegations of jurisdiction, [] the movant is deemed to be challenging the factual basis for the court's subject matter jurisdiction." *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1572, 1583 (Fed. Cir. 1993) (citing *Trentcosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987)).

Under a factual attack, there is effectively a presumption *against* jurisdiction. Jurisdictional allegations are not presumed to be true, and the plaintiff bears the burden to prove that jurisdiction exists. *Golden v. Gorno Bros., Inc.*, 410 F.3d 879, 881 (6th Cir. 2005); *see also NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 341 (3rd Cir. 2001) (acknowledging that facial and factual challenges to jurisdiction "are subject to different standards").

As *McNutt* states, if jurisdictional facts "are challenged by his adversary in any appropriate manner, [the plaintiff] **must support them by competent proof**." *McNutt*, 298 U.S. at 189 (emphasis added).

Eleven years after *McNutt,* in 1947 this Court clarified that the procedure for considering a factual challenge to subject matter jurisdiction is flexible: "[t]he court may inquire by affidavits or otherwise, into the facts as they exist. . . . 'As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.'" *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) (internal citations omitted).

A split exists among the circuit courts as to whether *Land v. Dollar* abrogates the *McNutt* requirement that irrespective of its "mode for determination," a district court is required under law to receive and consider evidence supporting or defeating the factual challenge to the existence of subject matter jurisdiction.

The First, Second, Sixth, Ninth and D.C. Circuits follow *McNutt*, and each of these circuits has affirmatively held that a federal district court must disregard the allegations of the pleading and weigh the evidence supporting or defeating jurisdiction. *See Valentin v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001) (holding that a factual challenge to the court's jurisdiction "permits (*indeed, demands*) differential factfinding," and "the court *must* address the merits of the jurisdictional claim by resolving the factual disputes between the parties") (emphasis added); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998) (reversing and remanding because the district court "looked only to the complaint," and "*should have looked* outside the pleadings to the

submissions, which both contradicted and supported the bare allegations of jurisdiction pleaded in the complaint") (emphasis added); *Golden*, 410 F.3d at 881 (Sixth Circuit) ("When a Rule 12(b)(1) motion attacks the factual basis for jurisdiction, the district court *must* weigh the evidence and the plaintiff has the burden of proving that the court has jurisdiction over the subject matter.") (emphasis added); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) ("If the moving party converts 'the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion *must* furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.'") (emphasis added) (quoting *Savage v. Glendale Union High School*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003), *cert. denied,* 541 U.S. 1009 (2004)); *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (in a factual challenge to the court's jurisdiction, "the court *must* go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss") (emphasis added).

By contrast, the Third, Fourth, Fifth, Seventh, Eighth, Tenth and Federal Circuits have interpreted *Land v. Dollar* to give such wide latitude as to how jurisdictional facts are evaluated, that they appear not to mandate that the district court receive or consider "competent proof" as required by *McNutt*. *See Mortensen v. First Federal Sav. and Loan Ass'n*,

549 F.2d 884, 891 (3rd Cir. 1977) (stating that a district court is "*free to weigh the evidence* and satisfy itself as to the existence of its power to hear the case") (emphasis added); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) ("A trial court *may* then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.") (emphasis added); *Montez v. Dep't of Navy*, 392 F.3d 147 (5th Cir. 2004) ("In general, where subject matter jurisdiction is being challenged, the trial court is *free to weigh the evidence* and resolve factual disputes in order to satisfy itself that it has the power to hear the case.") (emphasis added); *but see Oaxaca v. Roscoe*, 641 F.2d 386, 391 (5th Cir. 1981) (in a factual attack, "matters outside of the pleadings, such as affidavits and testimony, *are considered*.") (emphasis added); *see also International Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir. 1980) (in a factual challenge, "the court need not accept the allegations of the complaint as true; the court *may* look behind the complaint and view the evidence to determine whether a controversy in fact exists.") (emphasis added); *Osborn v. U.S.*, 918 F.2d 724, 729 (8th Cir. 1990) (quoting *Mortensen* with approval); *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302-03 (10th Cir. 2001) ("the court does not 'presume the truthfulness of the complaint's factual allegations,' *but 'has wide discretion* to allow affidavits, other documents, and a limited evidentiary hearing to resolve' the Rule 12(b)(1) motion.") (emphasis added) (quoting *Holt v. United States*, 46 F.3d 1000,

1002-03 (10th Cir. 2001)); *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993) ("In establishing the predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but *may* review evidence extrinsic to the pleadings, including affidavits and deposition testimony.") (emphasis added).[7]

The distinction between a "must consider evidence" and a "may consider evidence" standard is not academic. In the instant case, CCA presented three factual challenges to the existence of subject matter jurisdiction, and provided evidentiary support for each challenge. Neither Chase nor the other interpleader defendants offered any substantive evidence to rebut or otherwise challenge CCA's evidence. Yet the district court simply declined to consider the evidence.

A standard that allows a district court discretion to decline consideration of evidence may be consistent with Fifth Circuit law, but is inconsistent with the law of this Court as articulated in *McNutt* and the First, Second, Sixth, Ninth and D.C. Circuits. Such a standard is also inconsistent with the well

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[7] In an unpublished opinion, the Eleventh Circuit has stated the same discretionary standard for consideration of a factual challenge to subject matter jurisdiction. *U.S. v. Spitzer*, 2007 WL 2376783 (11th Cir. August 21, 2007) ("there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case").

established principle that the district court should not presume any jurisdictional allegation to be true once a factual challenge is asserted. *Golden*, 410 F.3d at 881.

The sole apparent exception to the requirement that the district court immediately resolve factual challenges – that the challenge is intertwined with the merits of the case – is inapplicable. The circuit court cases that defer due to "intertwining" are all cases or claims involving the district court's federal question jurisdiction, not its diversity jurisdiction. The reasoning for deferring consideration is that the delay enables the district court to fully and fairly consider the federal rights at issue in the case. As the Fifth Circuit stated in *Getty Oil v. Ins. Co. of North America*, 841 F.2d 1254 (5th Cir. 1998), this reasoning has no applicability to 12(b)(1) motions challenging the existence of diversity jurisdiction:

> The defendants-appellees also argue that where the merits are clear and the jurisdictional issue difficult, we may by-pass the jurisdictional issue and reach the merits, citing *inter alia,* [internal citations omitted]. . . . [In the cited cases], the merits issues were ones of federal law and the jurisdictional issue did not involve any question of whether a federal court had properly seized itself of a matter appropriately commenced and clearly cognizable in state court. Those cases, if they belonged in court at all, belonged in federal court. . . . However, absent appropriate diversity, we cannot deprive

> Getty of its right to have its Texas law-based suit proceed in the Texas courts even if we were to conclude that it is obvious the Texas courts would ultimately rule against Getty on the merits.

Getty Oil, 841 F.2d at 1260 n.8.

The sole purpose of an interpleader action is to resolve competing claims to the specific fund; interpleader is not appropriately used to resolve other claims between the claimants. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 535 (1967) (interpleader was never intended to be used to solve all the problems of multiparty litigation). Given the limited nature of interpleader, the only "merits" in controversy before the federal district court is the most superior claim to the fund.

By contrast, CCA's factual challenge requires the district court to determine three jurisdictional fact allegations: (a) USON's corporate citizenship for purposes of diversity; (b) whether Chase has deposited the highest amount in controversy or the full amount of the interpleader fund; and (c) whether Chase has "unclean hands" and therefore, is not entitled to seek the equitable jurisdiction of the district court.

The latter two allegations bear on the interpleader plaintiff's conduct, not the competing claims to the fund. As to the alter ego allegations, the only jurisdictional fact at issue is USON's corporate citizenship, "a fact utterly irrelevant to superiority of one

claim versus another." *See Valentin v. Hospital Bella Vista*, 254 F.3d at 363 n.3 (in a factual attack on subject matter jurisdiction, holding that the intertwined exception does not apply to a case challenging diversity jurisdiction). Even if Chase has stated a legitimate claim asserted by USON, and even if on the merits that claim were superior to all other claims, subject matter jurisdiction would still be lacking if USON were factually deemed to be a citizen of the state of Oklahoma.

To the extent that some circuit courts (including the Fifth Circuit) have interpreted *Land v. Dollar* to abrogate mandatory consideration of a factual challenge to the existence of subject matter jurisdiction, CCA requests review in this Court to clarify that *McNutt* is controlling. CCA further requests review to determine whether the "intertwining" exception to consideration of a factual challenge is applicable to cases alleging jurisdiction on the basis of diversity of citizenship.

II. A Circuit Split Exists as to Whether Section 4 of the Federal Arbitration Act Limits a District Court's Authority to Compel Arbitration Under an Arbitration Agreement's Exclusive Venue Provision.

The Federal Arbitration Act, 9 U.S.C. §4, provides as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under

> a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . for an order that such arbitration proceed in the manner provided for in such agreement. . . . The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

Interpreting this provision, the Third, Sixth, Seventh and Tenth Circuits have all determined that when a forum clause is contained in the parties' agreement, a court outside the designated forum cannot compel arbitration either *in its district or outside its district* because to do so would contravene the parties' forum clause and Section 4 of the FAA:

> [W]here the arbitration agreement contains a forum selection clause, only the district court *in that forum* can issue a § 4 order compelling arbitration. Otherwise, the clause of § 4 mandating that the arbitration and the order to compel issue from the same district would be meaningless."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer, 49 F.3d 323, 327 (7th Cir. 1995) (emphasis in original). *See Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391 (3rd Cir. 1974) (reversing Virgin Islands district order compelling arbitration in New York City); *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1018 (6th Cir. 2003) (stating that "where the parties have agreed to

arbitrate in a particular forum, only a district court in that forum has jurisdiction"); *Ansara v. Qwest Communications Corp.*, 414 F.3d 1214 (10th Cir. 2005) (affirming refusal of Colorado district court to compel arbitration to take place in Washington, D.C.).

One circuit, however, holds the minority viewpoint and has found that its district courts can order arbitration in their respective jurisdictions. Ignoring the plain language of Section 4, the Ninth Circuit has said that the FAA "does not require venue in the contractually-designated locale." *Textile Unlimited, Inc. v. A..BMH & Co., Inc.*, 240 F.3d 781, 783 (9th Cir. 2001) (affirming district court order compelling arbitration to take place in California even though the applicable agreement required arbitration to occur in Georgia).

While the First, Second, Fourth, Eighth and Eleventh Circuits have not specifically addressed this issue, district courts within each of these jurisdictions have held consistent with the majority circuits' opinion that where a forum selection clause requires arbitration outside the court's jurisdiction, a motion to compel cannot be granted. *Dempsey v. George S. May Int'l*, 933 F. Supp. 72 (D. Mass. 1996); *Netherlands Curacao Co., N.V. v. Kenton Corp.*, 366 F. Supp. 744, 745-46 (S.D.N.Y. 1973); *Lawn v. Franklin*, 328 F. Supp. 791, 793 (S.D.N.Y. 1971); *M.C. Constr. Corp. v. Gray Co.*, 17 F. Supp. 2d 541, 548 (W.D. Va. 1998); *M.A. Mortenson Co. v. Mt. Carmel Sand & Gravel Co., Inc.*, 2005 WL 3477548 (D. Minn. Dec. 20, 2005); and

Haluska v. RAF Fin. Corp., 875 F. Supp. 825, 828 (N.D. Ga. 1994).

The only other circuit court to interpret Section 4, the Fifth Circuit, has carved a middle ground between the majority of its sister circuits and the Ninth Circuit. The Fifth Circuit has held that a party may be considered to have "waived" its right to conduct arbitration in a specific venue if such party initiates litigation outside of that venue. *Dubuy-Busching General Agency, Inc. v. Ambassador Ins. Co.*, 524 F.2d 1275 (5th Cir. 1975). *See National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326 (5th Cir. 1987) (limiting *Dubuy-Busching* holding to its specific factual context); *Municipal Energy Agency of Mississippi v. Big Rivers Elec. Corp.*, 804 F.2d 338 (5th Cir. 1986) (same).

As all of the parties subject to arbitration are defendants in this interpleader, the Fifth Circuit's waiver rule does not apply. Even if it were to apply, however, the inability of a district court to order arbitration under Section 4 is not the Draconian result it may seem to be. Under the FAA, litigants seeking to enforce arbitration provisions can either move to stay proceedings pending arbitration under 9 U.S.C. §3, or (where appropriate) seek an order compelling arbitration under 9 U.S.C. §4. Interpreting Section 4 to prohibit a district court from compelling arbitration does not, by itself, leave a litigant out of options. It simply means that the arbitration proponent falls back to its Section 3 right to have proceedings stayed pending arbitration.

The Court's rulings discussing the history and intent of the FAA are consistent with the conclusion that Sections 3 and 4 operate in tandem. *See Cortez Bird Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193 (2000) (holding that the venue provisions of 9 U.S.C. §§9-11 should be read in the context of the statute's history and intent). "The Act was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate, and place such agreements upon the same footing as other contracts." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989) (internal citations omitted). The FAA, and particularly Section 4, does not confer a right to compel arbitration of any dispute at any time; it simply permits federal courts to direct that arbitration proceed in the manner provided for in the parties' agreement. *Id.*

In this case, the parties to the MSA contractually agreed that Oklahoma state and federal courts, exclusively, could conduct proceedings relating to the MSA:

> The federal and State courts of Tulsa County, Oklahoma shall be the *exclusive* venue for any litigation, special proceeding, or other proceeding between the parties that may arise out of, or be brought in connection with or by reaons of, this Management Services Agreement.

MSA §8.4 (emphasis added). In fact, and as contemplated by the MSA, an Oklahoma state court is

currently considering the viability of the MSA's arbitration provision in connection with the parties' dispute.

The Court should clarify that under such circumstances, 9 U.S.C. §3 permits a stay of the interpleader in furtherance of the statutory intention to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." However, 9 U.S.C. §4 precludes the Texas district court from actually compelling arbitration, to honor the statutory intention of placing the arbitration provision on the same footing as the rest of the terms of the contract. On the request of either party, venue can also be transferred to the proper district should the court feel that a stay is inadequate to protect the parties' interests.

To hold otherwise would confer a right upon the parties that does not exist under their contract – the right to seek a resolution of a dispute under the MSA in a court outside of the state of Oklahoma. There is no federal policy, in the statutes or the case law, preferring arbitration to the extent that a party obtains more favorable rights under law than those gained in the underlying contract. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 n.9 (2002) (recognizing that prior Court cases "direct [federal] courts to respect the terms of the agreement without regard to the federal policy favoring arbitration").

Because the rulings of the Texas district court, the Fifth Circuit, and the Ninth Circuit are inconsistent with the intent and language of Section 4 as well

as the majority of the circuit and district courts interpreting this provision, CCA respectfully requests that the Court issue a writ of certiorari to resolve the circuit split that exists.

III. This Case Presents Important Issues Requiring Immediate Review.

CCA seeks certiorari review of the Fifth Circuit's decision denying the petition for writ of mandamus because of the unique and important nature of subject matter jurisdiction, particularly in the context of the FAA and well established principles of comity.

The All Writs Act, 28 U.S.C. §1651(a), authorizes courts of appeals to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

> The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.

Cheney v. U.S. Dist. Court for the Dist. of Columbia, 542 U.S. 367, 381 (2004) (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)); *see also BancOhio Corp. v. Fox*, 516 F.2d 29, 32-33 (6th Cir. 1975).

As the Sixth Circuit in *BancOhio* also observed, "(t)his standard has been held to have been met where 'the court was not authorized to retain jurisdiction and should have sustained the various motions to dismiss. . . .'" *BancOhio*, 516 F.2d at 33 (citing *Tennessee v. Taylor*, 169 F.2d 626, 638 (10th Cir. 1966)).

CCA challenges the jurisdictional actions of the district court under the federal interpleader statute, the FAA, and Article III of the Constitution. Unlike other jurisdictional issues (such as personal jurisdiction) which typically reflect individual interests, subject matter jurisdiction represents a nonwaivable institutional interest in limiting the actions and conduct of the federal district courts to the powers prescribed by Article III of the Constitution and federal statutes. *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 480 (4th Cir. 2005) (quoting *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

The right not to be compelled to proceed in a federal district court is the intrinsic value that differentiates a challenge to a court's subject matter jurisdiction from all other jurisdictional issues. *Rurhgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed."); *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). This issue

gains heightened importance in an interpleader action, where parties should not be compelled to litigate any issue greater than that required to resolve entitlement to the fund. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).

Certiorari is appropriate in this case because, as stated above, the district court's analysis – of both statutory interpleader and FAA jurisdiction – significantly departed from legal standards and jurisdictional restraints contained in established Supreme Court and courts of appeals precedent. In so doing, the district court has created an unnecessary, costly and inefficient legal morass for the parties to wade through. Simultaneously, CCA, USON and AOR-OK are proceeding on the merits in state court in Tulsa and in an arbitration proceeding over the ownership of the funds. The district court has retained jurisdiction over ostensibly "compulsory" counterclaims that CCA had no choice but to file against Chase in the Southern District of Texas case, necessitating further inefficient and duplicate proceedings.

But the district court's exercise of jurisdiction to compel the parties to arbitration extends far beyond delay and expense associated with trial. The issuance of a writ is necessary given that it is "the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations." *Will v. United States*, 389 U.S. 90, 95 (1967) (citing *State of Maryland v. Soper*, 270 U.S. 9 (1926)). As the Fifth Circuit has stated, "[t]he policy against federal interference with a state suit previously filed is of long standing

and is a necessary objective in maintaining a balanced federal-state relationship." *Southern Cal. Petroleum Corp. v. Harper*, 273 F.2d 715, 720 (5th Cir. 1960).

The district court's assumption of jurisdiction in order to compel arbitration, the propriety of which is contractually reserved under the MSA for determination by the state and federal courts of Oklahoma, interferes with state court proceedings for the precise reason that mandamus relief is appropriate. On or about March 15, 2007, the Supreme Court of the state of Oklahoma issued an opinion in an action styled *Oklahoma Oncology & Hematology, P.C., an Oklahoma Professional Corporation d/b/a Cancer Care Associates, Appellant v. U.S. Oncology, Inc., a Delaware Corporation and AOR Management Company of Oklahoma, Inc., a Delaware Corporation* (the "Oklahoma Supreme Court Order") (Pet. App. 155).

The Oklahoma Supreme Court addressed certain issues in connection with the "first filed" lawsuit pending in the Tulsa state trial court. Among the issues addressed, for example, were the circumstances under which USON could compel arbitration of its dispute with CCA, guidance on the proper interpretation of the MSA, and the right of CCA to have a state trial court determine whether the arbitration clause in dispute conforms to Oklahoma public policy.

The federal district court's orders interfere with the Oklahoma Supreme Court Order. Its actions in

this case are contrary to fundamental principles of comity, the FAA and federal-state relations. "Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." *Brillhard v. Excess Ins. Co. of America*, 316 U.S. 491 (1942); *see also Morrow v. Harwell*, 768 F.2d 619 (5th Cir. 1985) ("[I]n all cases implicating state/federal relations, federal courts ought to intrude into state affairs no more than is absolutely necessary.").

Instead of giving respect to the right and ability of Oklahoma state and federal courts to interpret the FAA and the parties' contract, the district court has interpreted federal law in a way that creates jurisdiction where none otherwise exists. This is not the intention of the FAA or established precedent. *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 163 n.1 (5th Cir. 1998) (citing the "well established" rule that the FAA does not create jurisdiction).

CONCLUSION

With very rare exception, federal courts have a responsibility to consider first and resolve subject matter jurisdiction challenges once raised and before any other proceedings take place. *Ruhrgas AG*, 526 U.S. at 587. A district court wholly fails to perform this obligation when it applies improper standards to a party's Rule 12(b)(1) motion to dismiss. It further compounds this problem when it retains jurisdiction

solely for the purpose of exceeding its authority under another federal statute. This Court's intervention to instruct the lower courts on the application of accurate legal standards in rulings that pertain to the exercise of their jurisdiction strikes at the very heart of mandamus relief and certiorari review.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20404

In Re:
OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C.,
Doing Business as Cancer Care Associates,

Petitioner.

Petition for Writ of Mandamus to
the United States District Court
for the Southern District of Texas

(Filed Jun 20, 2007)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for writ of mandamus is DENIED. The motion for leave to file a reply is DENIED. The request for oral argument is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JPMORGAN CHASE BANK, N.A., Plaintiff,	§	
v.	§	
OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. d/b/a CANCER CARE ASSOCIATES, US ONCOLOGY, INC., and AOR MANAGEMENT COMPANY OF OKLAHOMA, INC.,	§	CIVIL ACTION NO. H-06-0645
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the court are Interpleader-Defendant Cancer Care Associates' Motion to Transfer Venue (Docket Entry No. 54) and Interpleader-Defendants US Oncology, Inc. and AOR Management Company of Oklahoma, Inc.'s Motion to Compel Arbitration (Docket Entry No. 47). For the reasons stated below, the Motion to Transfer Venue will be denied, and the Motion to Compel Arbitration will be granted.

I. Background

Interpleader-Plaintiff JPMorgan Chase Bank, N.A. ("Chase") brought this action to determine the validity of rival claims to funds deposited in one of its

accounts (the "Chase Account"). The source of this dispute began in 1995 when AOR Management Company of Oklahoma, Inc. ("AOR-OK"), a wholly-owned subsidiary of US Oncology, Inc. ("USON"), entered into a Management Services Agreement ("MSA") and a Purchase Agreement with Cancer Care Associates ("CCA").[1] Pursuant to the MSA, AOR-OK managed, for a monthly fee, the business aspects of CCA's practice, which included paying CCA's operational expenses and compensation to the CCA physician/owners.[2] As part of this arrangement, payments from third-party payors for services rendered by CCA were routed to the Chase Account, which was styled in CCA's name and managed by AOR-OK.[3] To insure that there would be sufficient liquidity to pay CCA's expenses, the parties agreed that

> [AOR-OK] may, during the Term, purchase, with recourse to [CCA] for the amount of the purchase, the accounts receivable of [CCA] arising during the previous month by transferring the amount set forth below into the [CCA] Account. . . . Although it is the intention of the parties that [AOR-OK] purchase

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[1] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement. Article VIII, § 8.5 describes how AOR-OK was assigned the rights and obligations under this agreement.

[2] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement, arts. IV, § 4.9 and VI.

[3] *Id.* art. IV, § 4.9.

> and thereby become the owner of the accounts receivable of [CCA], in the event such purchase shall be ineffective for any reason, [CCA] is concurrently herewith granting to [AOR-OK] a security interest in the accounts receivable. . . . All collections in respect to such accounts receivable purchased by [AOR-OK] shall be received by [AOR-OK] as the agent of [CCA] and shall be endorsed to [AOR-OK] and deposited in a bank account at a bank designated by [AOR-OK].[4]

USON and AOR-OK allege that USON advanced the funds toward payment of CCA's expenses, thereby obtaining either an ownership or a security interest in CCA's receivables.[5]

This arrangement continued until 2004 when the parties began to negotiate the terms of the MSA's termination. These negotiations were unsuccessful, and in January of 2005 CCA gave notice to AOR-OK that it considered the MSA to be illegal and therefore void.[6] AOR-OK subsequently initiated an arbitration action with the American Arbitration Association pursuant to the arbitration provisions in the MSA and Purchase Agreement.[7] CCA responded by filing a lawsuit in the District Court of Tulsa County,

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[4] *Id.* art. VI, § 6.6.

[5] Motion to Compel Arbitration, Docket Entry No. 47, p. 3.

[6] *Id.* at 4.

[7] Section 8.6 of the MSA and article XI of the Purchase Agreement contain the arbitration provisions at issue.

Oklahoma, against both AOR-OK and USON (the "Oklahoma litigation") on February 14, 2005.[8] The Tulsa District Court granted USON and AOR-OK's motion to compel arbitration on August 5, 2005. CCA then filed a mandamus petition and appeal with the Oklahoma Supreme Court. On November 28, 2005, the Oklahoma Supreme Court consolidated the mandamus petition into the appeal and issued a stay of "all matters relating to court-ordered arbitration relating to this dispute" during the pendency of the appeal.[9]

Despite the ongoing arbitration and Oklahoma litigation, USON and AOR-OK allege that they continued to advance funds to CCA and that AOR-OK continued to manage CCA's business pursuant to the MSA.[10] In February of 2006, however, CCA allegedly began to redirect payments from its third-party payors from the Chase Account into its own separate account. CCA's attorney also contacted Chase to challenge AOR-OK and USON's authority over and access to funds in the Chase Account. Chase responded by placing a hold on withdrawals from the Chase Account, but continued to accept deposits. Upon learning of the hold on the Chase Account, counsel for AOR-OK and USON drafted a letter to

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[8] Motion to Compel Arbitration, Docket Entry No. 47, pp. 5-6.

[9] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, Exhibit 16.

[10] Motion to Compel Arbitration, Docket Entry No. 47, p. 6.

CCA, copying Chase, challenging the actions taken. Based on these events Chase filed this interpleader action on February 14, 2006, and tendered the funds from the Chase Account into the court's registry.

II. Motion to Transfer Venue

CCA moves this court to transfer venue to the Northern District of Oklahoma pursuant to 28 U.S.C. § 1404(a).[11] Section 1404(a) allows district courts to transfer an action to another proper venue "for the convenience of parties and witnesses" if such a transfer will be "in the interest of justice." 28 U.S.C. § 1404(a) (2006). "The determination of 'convenience' turns on a number of private and public factors, none of which are given dispositive weight." *In re Volkswagen of America, Inc.*, 371 F.3d 201, 203 (5th Cir. 2004). These factors include (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive; (5) the administrative difficulties flowing from court congestion; (6) the local interest in having localized interests decided at home; (7) the familiarity of the forum with the law that will govern the case; and (8) the avoidance of

[11] Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Rule 1404(a) Motion to Transfer Venue, Docket Entry No. 54.

unnecessary problems of conflict of laws and of the application of foreign law. *Id.* Because a plaintiff is generally entitled to choose the forum, the movant, CCA, bears the burden of demonstrating that transfer is appropriate. *Time, Inc. v. Manning,* 366 F.2d 690, 698 (5th Cir. 1966); *see also Peteet v. Dow Chem. Co.,* 868 F.2d 1428, 1436 (5th Cir. 1989).

CCA argues that the Northern District of Oklahoma is a more convenient forum because its employees and documents are located there, there is local interest in the case being tried in Oklahoma, the Northern District of Oklahoma is less congested than the Southern District of Texas, and the Oklahoma courts have more familiarity with Oklahoma law, which CCA claims will be applied to the case.[12] The court is not persuaded by CCA's arguments. First, it is unclear that the employees identified by CCA would be necessary witnesses in this contract dispute. Furthermore, it appears that as many potential witnesses and documents are available in Houston as in Oklahoma.[13]

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[12] *Id.* Despite arguing that the MSA is invalid, CCA also argues that the MSA's forum selection clause, which states that "the federal and state courts of Tulsa County, Oklahoma shall be the exclusive venue for any litigation" between the parties, should be given weight. However, Chase is not a party to the MSA, and the Supreme Court has held that Forum selection clauses should not be given dispositive weight. *Steward Org., Inc. v. Rico Corp., et al.,* 108 S. Ct. 2239, 2245 (1988).

[13] JPMorgan Chase Bank's Response to Motion to Transfer Venue, Docket Entry No. 64, p. 5; US Oncology, Inc. and AOR

(Continued on following page)

With regard to local interest in the case, CCA argues that "this case could potentially impact the health, safety, and welfare of Oklahoma citizens."[14] However, this action involves the validity of a contract and the competing claims to funds in the Chase Account. The court is not persuaded that Oklahoma citizens' health, safety, and welfare are so closely related to this dispute.

CCA's argument that the Northern District of Oklahoma's familiarity with Oklahoma law warrants transfer is similarly unpersuasive. CCA has alleged that the actions of USON and AOR-OK violated both state and federal laws.[15] Furthermore, the MSA states that it "shall be governed by the laws of the state of Texas."[16] It is therefore unclear that Oklahoma courts will have any distinct advantage in determining the validity of the contract and the ownership of the funds in the Chase Account.

Management Company of Oklahoma, Inc.'s Response to 1404(a) Motion to Transfer Venue, Docket Entry No. 61, p. 6.

[14] Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Rule 1404(a) Motion to Transfer Venue, Docket Entry No. 54, p. 12.

[15] Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Rule 1404(a) Motion to Transfer Venue, Docket Entry No. 54, p. 2; Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry no. 60, pp. 14-18.

[16] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement, art. VIII, § 8.4.

III. Motion to Compel Arbitration

A. Standard of Review

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.*, creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. 927, 941 (1983). When deciding whether parties should be compelled to arbitrate, courts conduct a two-step inquiry. *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211, 214 (5th Cir. 2003). First, the court must decide whether the parties agreed to arbitrate their dispute and, if so, whether this dispute falls within the scope of the arbitration agreement. *Id.* Second, the court must consider whether any federal statute or policy renders the claims nonarbitrable. *Id.*

B. Analysis

1. Is there a valid agreement to arbitrate between the parties?

Determination of whether the parties agreed to arbitrate their dispute involves two considerations: "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *OPE Intl LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 445 (5th Cir. 2001). Both the MSA and the Purchase Agreement contain arbitration clauses. The MSA states:

> The parties shall use good faith negotiation to resolve any controversy, dispute or disagreement arising out of or relating to this [MSA] or the breach of this [MSA]. Any matter not resolved by negotiation shall be submitted to binding arbitration and such arbitration shall be governed by the terms of Article XI of the Purchase Agreement, which, as it applies to the parties hereto, is incorporated herein by reference in its entirety.[17]

Article XI of the Purchase Agreement states:

> Any dispute, controversy or claim (including without limitation tort claims, requests for provisional remedies or other interim relief, and issues as to arbitrability of any matter) arising out of this Purchase Agreement, or the breach thereof, that cannot be settled through negotiation shall be settled (a) first, by the parties in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association ("AAA") . . . and (b) if the controversy, claim or dispute cannot be settled by mediation, then by arbitration administered by the AAA under its Commercial Arbitration Rules . . . and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.[18]

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[17] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement, art. VII, § 8.6.

[18] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit A, art. XI, § 11.01.

CCA argues that arbitration is not proper because no agreement to arbitrate exists between all the parties since USON and Chase were not signatories to the MSA or the Purchase Agreement.[19] However, no party has moved to compel arbitration of any claims by or against Chase. Thus, such claims have no bearing on whether the court should grant USON and AOR-OK's request that the competing claims to the interpleaded funds be arbitrated.

With regard to USON, USON and AOR-OK argue that USON is not a complete stranger to the contracts because § 8.5 of the MSA specifically contemplates that "American Oncology Resources, Inc." would succeed to all of the management rights and obligations under the MSA and would then assign and deliver all of its rights and obligations to its wholly-owned subsidiary, AOR-OK. USON and AOR-OK allege that USON was formerly known as "American Oncology Resources, Inc." and that it was therefore an integral part of the transaction.[20] USON

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[19] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, p. 19. CCA also argues that USON Corporate, another distinct legal entity that CCA alleges should have been included in this interpleader action, is not a party to these agreements and, therefore, arbitration is not appropriate. *Id.* at 19-20. However, because USON Corporate was never added to this action, this argument is not relevant to the issue of the appropriateness of arbitration.

[20] Reply Brief in Support of Motion to Compel Arbitration, Docket Entry No. 68, p. 12. CCA does not dispute that USON

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and AOR-OK also argue that USON's request for arbitration is proper because its dispute over the interpleaded funds is "substantially interdependent" and "intertwined" with the MSA.[21] The Fifth Circuit has identified two circumstances under which a non-signatory can compel arbitration. *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000). First, "when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory." *Id.* (quoting *MS Dealer Service Corp. v. Franklin,* 177 F.3d 942, 947 (11th Cir. 1999)). Second, "when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Id.* (quoting *MS Dealer,* 177 F.3d at 947). The *Grigson* court emphasized that each case turns on its facts and that the decision to utilize equitable estoppel in this fashion is within the district court's discretion. *Id.* at 527-28.

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was formerly known as American Oncology Resources, Inc. Furthermore, CCA acknowledges that USON drafted "all of the relevant documents creating and governing the parties' relationship, including the MSA." *Id.* at 2. In addition, CCA filed claims against both AOR-OK and USON in the Oklahoma litigation.

[21] Reply Brief in Support of Motion to Compel Arbitration, Docket Entry No. 68, p. 12.

CCA argues that the MSA itself is invalid and that the actions taken by USON and AOR-OK under the MSA "put CCA out of compliance with state and federal laws.[22] Because the ownership of the funds in the Chase Account cannot be established without examining the MSA, and because that contract contained the arbitration agreement at issue in this case, CCA must rely on the terms of the MSA to assert its claims against USON. Thus, the first prong of the *Grigson* test is met.

With regard to the second prong of the *Grigson* test, CCA alleges that USON and AOR-OK's daily sweeps of the Chase Account violated state and federal laws.[23] However, neither the factual nor the legal allegations asserted by CCA distinguish between the actions taken by USON and those taken by AOR-OK. The allegations that CCA asserted against AOR-OK are inextricably intertwined with the allegations it has asserted against USON. The court therefore concludes that USON can compel CCA to arbitrate this dispute under the valid arbitration agreement.

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[22] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, p. 20.

[23] *Id.*

2. Does the parties' dispute fall within the arbitration agreement?

CCA also argues that the parties' dispute is outside the scope of the arbitration agreement because the MSA's arbitration provision does not contain language about tort claims, requests for provisional remedies or other interim relief, or issues as to arbitrability, as is mentioned in the Purchase Agreement.[24] Determining whether a dispute falls within the scope of an arbitration clause requires the court to characterize the arbitration clauses as "broad" or "narrow." *Pennzoil Exploration & Production Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998). "Broad arbitration clauses . . . embrace all disputes between the parties having a significant relationship to the contract, regardless of the label attached to the dispute." *Id.* Narrow arbitration clauses require arbitration only of disputes "arising out of" the contract, while broad clauses are those that cover all disputes that "relate to" or "are connected with" the contract. *Id. See also, Prima Paint,* 87 S. Ct. at 1802-03 (labeling as "broad" a clause requiring arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"). In determining whether the dispute in question falls within the scope of the arbitration agreement, "ambiguities as to the scope of the arbitration clause itself [are] resolved in favor of arbitration."

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[24] *Id.* at 22.

Here, the MSA mandates arbitration for "any controversy, dispute, or disagreement arising out of or relating to this [MSA] or the breach of this [MSA].[25] The court concludes that this is a "broad" arbitration clause because it encompasses any disputes "relating to" the MSA. CCA's allegations that the MSA is invalid and that USON and AOR-OK's actions pursuant to the MSA are illegal therefore fall within the express language of the arbitration clause.

3. Do any federal statutes or policies render the claims nonarbitrable?

CCA argues that "important and overriding public policies inherent in this case" render it inappropriate for arbitration.[26] CCA contends that the health, safety, and welfare of its patients are implicated by this action because Oklahoma and Texas do not allow corporations to practice medicine and that the actions of USON and AOR-OK under the MSA caused CCA to be in violation of these laws.[27] CCA also argues that the MSA and actions taken thereunder violate federal Medicare and Medicaid laws.[28]

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[25] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement, art. VII, § 8.6.

[26] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, p. 14.

[27] *Id.* at 14-15.

[28] *Id.* at 15.

However, this case is not about the "health, welfare, and safety" of CCA's patients, but is instead a contract dispute. No federal law or policy evidences a clear intent by Congress to limit this area of law to the judiciary. In fact, disputes involving healthcare and Medicare/Medicaid statutes are routinely submitted to arbitration. *See, e.g., Kirby Highland Lakes Surgery Ctr., L.L.P. v. Kirby,* 183 S.W.3d 891, 895 (Tex. App. – Austin 2006, no pet.) (finding that the FAA applied to a lawsuit where "the underlying dispute concern[ed] billings to Medicare and Medicaid"); *Kroupa v. Casey,* 2005 Tex. App. LEXIS 10212 (Tex. App. – Houston [1st Dist.] 2005, no pet.) (same). The court is not persuaded by CCA's argument that public policy makes the claim nonarbitrable.

Finally, CCA argues that the court should abstain from ruling on the motion to compel arbitration under the *Colorado River* doctrine until the Oklahoma Supreme Court determines the appropriateness of arbitration.[29] In *Colorado River Water Conservation*

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[29] *Id.* at 12. CCA also challenges the court's jurisdiction, arguing that this is an improper interpleader action because USON and AOR-OK cannot assert a true claim to ownership of the interpleaded funds. *Id.* at 7. Under 28 U.S.C. § 1335(a), the court has jurisdiction over any civil action of interpleader filed by a party having in its custody or possession $500 or more if two or more adverse claimants of diverse citizenship are claiming or may claim to be entitled to such money, and if the plaintiff has deposited such money into the registry of the court. This is a proper interpleader action. There was a single account, the Chase Account, and two or more adverse parties were attempting to claim these funds. See JPMorgan Chase Bank's original

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Dist. v. United States, 96 S. Ct. 1236, 1246 (1976), the Supreme Court held that federal courts may abstain from exercising their jurisdiction over a case where "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," so warrant. The Court later clarified the doctrine by stating that

> [a]bstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to State court would clearly serve an important countervailing interest.

Complaint for Interpleader, Docket Entry No. 1, p. 4. USON and AOR-OK contend that they were and are authorized to withdraw funds from the Chase Account pursuant to the MSA and an irrevocable power of attorney executed by CCA in connection with the MSA "because (i) they own the funds collected from the accounts receivables that were and are deposited into the Chase Account, (ii) they are entitled to be reimbursed out of the Chase Account for the monies advanced to pay [CCA's expenses] and/or (iii) they are entitled to be paid out of the Chase Account for past management fees due AOR-OK." Motion to Compel Arbitration, Docket Entry No. 47, pp. 3-4.

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 103 S. Ct. 927 (1983) (internal quotations omitted). Rather than prescribing a "hard and fast rule" governing when the doctrine applies, the Court has identified six factors that a district court may consider when making this determination: (1) whether the state or federal court has assumed jurisdiction over the res; (2) the relative inconvenience of the forums; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether and to what extent federal law provides the rules of decision on the merits; and (6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction. *Id.* at 936-37, 941-42. *See also Murphy v. Uncle Ben's, Inc.*, 168 F.3d 734, 738 (5th Cir. 1999). None of these factors are determinative; rather, they require "a careful balancing of the important factors as they apply in a given case, with the balance most heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone,* 103 S. Ct. at 937.

USON and AOR-OK argue that application of these factors to this case does not warrant abstention.[30] The court agrees. First, the court currently

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[30] USON and AOR-OK also argue that the *Colorado River* abstention doctrine is inapplicable because the Oklahoma litigation are not a "parallel proceedings." Reply Brief in Support of Motion to Compel Arbitration, Docket Entry No. 68, p. 4. USON and AOR-OK point out that Chase is not a party to the Oklahoma litigation, and CCA's conversion and conspiracy

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maintains jurisdiction over the funds deposited into its registry. Second, a federal forum is not inconvenient, as explained in the court's denial of CCA's motion to transfer venue.

As to the third factor, "relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone,* 103 S. Ct. at 939. Also, "[a]llowing a federal court to order arbitration, even where a state court may construe an arbitration clause differently, is fully consistent with established congressional intent [to favor arbitration]." *Brown v. Pacific Life Ins. Co.,* 462 F.3d 384, 396 (5th Cir. 2006).

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claims against Chase are not issues in that action. They also note that because arbitrability is the only issue before the Oklahoma Supreme Court, the disputed claims to the interpleaded funds are not currently being litigated in any Oklahoma proceeding. *Id.* "Suits are 'parallel,' for the purposes of determining whether Colorado River abstention applies, if they involve the same parties and the same issues." *Diamond Offshore Co. v. A&B Builders*, 302 F.3d 531, 540 (5th Cir. 2002). However, the Fifth Circuit has recognized that "it may be that there need not be in every instance a mincing insistence on precise identity of parties and issues." *Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 395 n.7 (5th Cir. 2006) (internal quotations omitted). Because the court concludes that abstention is inappropriate, this issue need not be resolved.

Fourth, although the state court complaint was filed first, "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Moses H. Cone,* 103 S. Ct. at 940. USON and AOR-OK argue that similar progress has been made in each court.[31] CCA argues that the issues have been briefed at length in the Oklahoma litigation and that proceeding in this court would be expensive and duplicative.[32] The Oklahoma litigation was filed in February of 2005, and the state trial court granted USON and AOR-OK's motion to compel arbitration less than six months later.[33] In November of 2005 the Oklahoma Supreme Court issued a stay of court-ordered arbitration pending CCA's appeal. No discovery had yet taken place.[34] This action was filed in February of 2006, and all parties have provided extensive briefing to this court. The court concludes that sufficient "progress" has not been made in state court to warrant the "exceptional circumstances" required to abstain from exercising its jurisdiction.

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[31] Reply Brief in Support of Motion to Compel Arbitration, Docket Entry No. 68, p. 6.

[32] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, p. 13.

[33] Motion to Compel Arbitration, Docket Entry No. 47, pp. 5-6.

[34] US Oncology, Inc. and AOR Management Company of Oklahoma, Inc.'s Response to 1404(a) Motion to Transfer Venue, Docket Entry No. 61, p. 11.

With regard to the fifth factor, "the presence of federal-law issues must always be a major consideration weighing against surrender." *Moses H. Cone,* 103 S. Ct. at 942. In addition to the Federal Arbitration Act, CCA alleges that USON and AOR-OK's actions violated Medicare statutes and the False Claims Act.[35] Although state courts have concurrent jurisdiction to enforce these federal statutes, the court's "task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction." *Id.* (emphasis in original).

The final factor, whether the state court proceeding protects the rights of the party that invoked the federal jurisdiction, also weighs in favor of maintaining jurisdiction. Since Chase initiated this action in federal court and is not a party to the Oklahoma litigation, it is not certain that Chase's interests would be protected in the state court proceeding. Accordingly, the court declines to abstain under the *Colorado River* doctrine.

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[35] Interpleader Defendant Oklahoma Oncology & Hematology, P.C. d/b/a Cancer Care Associates' Response in Opposition to Motion to Compel Arbitration, Docket Entry No. 60, pp. 15-17.

IV. Conclusion and Order

For the reasons stated above, the court concludes that transfer to the Northern District of Oklahoma is not warranted under 28 U.S.C. § 1404(a) and that arbitration of the claims between CCA and USON and AOR-OK is appropriate. Accordingly, CCA's Motion to Transfer Venue (Docket Entry No. 54) is **DENIED** and USON and AOR-OK's Motion to Compel Arbitration (Docket Entry No. 47) is **GRANTED.** USON and AOR-OK are **ORDERED** to commence arbitration within 30 days and provide the court with a status report on March 30, 2007, and every 30 days thereafter.

SIGNED at Houston, Texas, on this 26th day of February, 2007.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JPMORGAN CHASE BANK, N.A.,	§	
Plaintiff,	§	
v.	§	
OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. d/b/a CANCER CARE ASSOCIATES, US ONCOLOGY, INC., and AOR MANAGEMENT COMPANY OF OKLAHOMA, INC.,	§	CIVIL ACTION NO. H-06-0645 (Filed May 11, 2007)
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the court are Interpleader-Defendant Cancer Care Associates' Motions to Dismiss for Lack of Subject Matter Jurisdiction (Docket Entry No. 91) and for Limited Jurisdictional Discovery (Docket Entry No. 84). For reasons stated below, both motions will be denied.

I. Background

Interpleader-Plaintiff JPMorgan Chase Bank, N.A. ("Chase") brought this action to determine the validity of rival claims to funds deposited in one of its accounts (the "Chase Account"). The source of this

dispute began in 1995 when AOR Management Company of Oklahoma, Inc. ("AOR-OK"), a wholly-owned subsidiary of U.S. Oncology, Inc. ("USON"), entered into a Management Services Agreement ("MSA") and a Purchase Agreement with Cancer Care Associates ("CCA").[1] Pursuant to the MSA, AOR-OK managed, for a monthly fee, the business aspects of CCA's practice, which included paying CCA's operational expenses and compensation to the CCA physician/owners.[2] As part of this arrangement, payments from third-party payors for services rendered by CCA were routed to the Chase Account, which was styled in CCA's name and managed by AOR-OK.[3] To insure that there would be sufficient liquidity to pay CCA's expenses, the parties agreed that

> [AOR-OK] may, during the Term, purchase, with recourse to [CCA] for the amount of the purchase . . . the accounts receivable of [CCA] arising during the previous month by transferring the amount set forth below into the [CCA] Account. . . . Although it is the intention of the parties that [AOR-OK] purchase and thereby become the owner of the accounts receivable of [CCA], in the event

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[1] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement. Article VIII, § 8.5 describes how AOR-OK was assigned the rights and obligations under this agreement.

[2] Motion to Compel Arbitration, Docket Entry No. 47, Exhibit B, Management Services Agreement, arts. IV, § 4.9 and VI.

[3] *Id.* art. IV, § 4.9.

> such purchase shall be ineffective for any reason, [CCA] is concurrently herewith granting to [AOR-OK] a security interest in the accounts receivable. . . . All collections in respect to such accounts receivable purchased by [AOR-OK] shall be received by [AOR-OK] as the agent of [CCA] and shall be endorsed to [AOR-OK] and deposited in a bank account at a bank designated by [AOR-OK].[4]

USON and AOR-OK allege that USON advanced the funds toward payment of CCA's expenses, thereby obtaining either an ownership or a security interest in CCA's receivables.[5]

This arrangement continued until 2004 when the parties began to negotiate the terms of the MSA's termination. These negotiations were unsuccessful, and in January of 2005 CCA gave notice to AOR-OK that it considered the MSA to be illegal and therefore void.[6] AOR-OK subsequently initiated an arbitration action with the American Arbitration Association pursuant to the arbitration provisions in the MSA and Purchase Agreement.[7] CCA responded by filing a lawsuit in the District Court of Tulsa County, Oklahoma,

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[4] *Id.* art. VI, § 6.6.

[5] Motion to Compel Arbitration, Docket Entry No. 47, p. 3.

[6] *Id.* at 4.

[7] Section 8.6 of the MSA and article XI of the Purchase Agreement contain the arbitration provisions at issue.

against both AOR-OK and USON (the "Oklahoma litigation") on February 14, 2005.[8]

Despite the ongoing arbitration and Oklahoma litigation, USON and AOR-OK allege that funds continued to be advanced to CCA and that AOR-OK continued to manage CCA's business pursuant to the MSA.[9] In February of 2006, however, CCA allegedly began to redirect payments from its third-party payors from the Chase Account into its own separate account. CCA's attorney also contacted Chase to challenge AOR-OK and USON's authority over and access to funds in the Chase Account. Chase responded by placing a hold on withdrawals from the Chase Account, but continued to accept deposits. Upon learning of the hold on the Chase Account, counsel for AOR-OK and USON drafted a letter to CCA, copying Chase, challenging the actions taken. Based on these events Chase filed this interpleader action on February 14, 2006, and tendered the funds from the Chase Account into the court's registry.

II. Analysis

Federal courts have jurisdiction over any civil action of interpleader filed by a party having in its custody or possession $500 or more if two or more adverse claimants of diverse citizenship are claiming or may claim to be entitled to such money, and if the

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[8] Motion to Compel Arbitration, Docket Entry No. 47, pp. 5-6.

[9] *Id.* at 6.

plaintiff has deposited such money into the registry of the court. 28 U.S.C. § 1335(a). Section 1335 has been construed to require only "minimal diversity," that is, the diversity requirement is met as long as any two adverse parties are not citizens of the same state. *State Farm & Casualty Co. v. Tashire*, 87 S.Ct. 1199, 1203 (1967). Pursuant to 28 U.S.C. § 1332(c)(1), CCA is a citizen of Oklahoma, USON is a citizen of Delaware and Texas, and AOR-OK is a citizen of Delaware and Oklahoma.[10]

The court understands CCA to argue that the court lacks jurisdiction because USON does not have an independent claim to the interpleaded funds and, therefore, is not an adverse claimant, destroying minimal diversity.[11] CCA argues that

> 29. Chase's Complaint does not allege that either AOR-OK or USON actually have a claim to all or any of the interplead[ed] fund, only that AOR-OK and USON, together, 'claim an ownership interest **in at least a portion of the funds** in the Account **to the extent that (1) they are** forced to pay [CCA's] operational and practice expenses out

[10] CCA is an Oklahoma corporation located in Oklahoma. USON is a Delaware corporation located in Texas. AOR-OK is a Delaware corporation located in Oklahoma. US Oncology, Inc. and AOR Management Company of Oklahoma, Inc.'s Response to CCA's Motion to Dismiss for Subject Matter Jurisdiction, Docket Entry No. 99, p. 3.

[11] Motion to Dismiss for Lack of Subject Matter Jurisdiction, Docket Entry No. 91, pp. 8-10.

> of pocket, and (2) the funds constitute receivables purchased from [CCA]';
>
> 30. The speculative and prospective nature of '**to the extent that** they **are** forced to pay [CCA's] operational and practice expenses out of pocket' does not constitute a claim and, in fact, belies a[n] existing claim with only the prospect of a future claim and is not a claim cognizable in this interpleader[.]"[12]

However, "[a]n interpleader action is designed to protect a stakeholder, *as such,* from the possibility of multiple claims upon a single fund. To this end the interpleader statute and rules are liberally construed to protect the stakeholder from the expense of defending twice, as well as to protect him from double liability." *In re Bohart*, 743 F.2d 313, 324-25 (5th Cir. 1984) (internal citations omitted) (emphasis in original). Section 1335(a) provides for original jurisdiction where two or more adverse, diverse claimants "are claiming or may claim to be entitled to such money." 28 U.S.C. § 1334(a)(1). Interpleader is therefore available to a stakeholder "even though no action has been brought against [it] nor any formal demand made upon [it] by some or all of the potential claimants" as long as it can demonstrate that it "has been or may be subjected to adverse claims." *Dunbar v. United States*, 502 F.2d 506, 511 (5th Cir. 1974) (citing *Tashire*, 87 S. Ct. 1199). Chase must demonstrate the

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[12] *Id.* at 9.

existence of a "colorable claim" adverse to that of CCA, *id.*, such that it "legitimately fears multiple vexation directed against a single fund," *Wausau Ins. Companies v. Gifford*, 954 F.2d 1098, 1101 (5th Cir. 1992) (quoting Wright et al., *Federal Practice and Procedure: Civil 2d*, § 1704 (1986)). "[T]he test for dismissal is a rigorous one and if there is any foundation of plausibility to the claim federal jurisdiction exists." *Evans v. Tubbe*, 657 F.2d 661, 663 (5th Cir. 1981) (quoting 13 Wright & Miller, *Federal Practice and Procedure,* § 1350 (1969)).

USON has repeatedly claimed its own interest in the interpleaded funds. USON alleges that it, not AOR-OK, made advances to pay CCA's expenses and/or purchased CCA's receivables.[13] The court is therefore satisfied that Chase has demonstrated that USON has a "colorable claim" that creates a legitimate fear of multiple vexation against the Chase Account. *Cf.*, *Dunbar*, 502 F.2d at 511 (holding that no adverse claim existed where the stakeholder sought to interplead "all absent, unknown persons having or claiming any right, title, or interest in and to the subject matter funds" and no party had come forward with a claim). Although CCA spends much energy debating the merits of USON's claim to the interpleaded funds,[14] these questions are not relevant to the court's jurisdiction. "[In a factual attack]

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[13] Motion to Compel Arbitration, Docket Entry No. 47, p. 3.

[14] Motion to Dismiss for Lack of Subject Matter Jurisdiction, Docket Entry No. 91, p. 9, ¶¶ 31-33.

[j]urisdiction is not dependent upon whether the claim for relief is meritorious; the federal courts lack jurisdiction only if the claims are plainly frivolous or patently without merit." *Id.* (internal citation omitted). The court is persuaded by the pleadings filed in this action that USON's claims are not plainly frivolous or patently without merit.

CCA also argues that AOR-OK was merely the alter-ego of USON and that USON should therefore be considered a citizen of Oklahoma.[15] CCA points the court's attention to its affirmative claims and causes of action filed in the Oklahoma litigation.[16] However, CCA has not sued USON in this action on the basis of its alter ego status. Therefore, such allegations are not relevant to the jurisdictional analysis. *See Kuehne & Nagel v. Geosource, Inc.*, 874 F.2d 283, 290-91 (5th Cir. 1989) (distinguishing between claims in which the plaintiff sued the defendant as an alter ego and claims based on the defendant's own conduct or the defendant's own counterclaims). Here, USON asserts a claim to the interpleaded funds in its own right, based on its own alleged actions. The court therefore concludes that the minimal diversity requirement of § 1335(a) is satisfied.

Finally, CCA argues that jurisdiction is lacking because after filing this lawsuit, Chase began depositing payments payable to CCA into a different account

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[15] *Id.* at 5-8.

[16] *Id.* at 5, n.15.

in USON's name and, therefore, the funds have not been deposited into the court's registry as required by § 1335(a).[17] It is undisputed, however, that all monies deposited into the Chase Account referenced in Chase's original petition have been deposited or are in the process of being deposited into the court's registry. CCA's allegation regarding the subsequent payments into a different account do not deprive the court of jurisdiction over the funds from the Chase Account that have been deposited according to § 1335.

Because the court has concluded that it has jurisdiction over this action, CCA's Motion for Limited Jurisdictional Discovery (Docket Entry No. 84), in which it seeks discovery "only pertaining to the legitimate existence of subject matter jurisdiction," is moot.

III. Conclusion and Order

For the reasons stated above, the court concludes that jurisdiction is proper under 28 U.S.C. § 1335(a). Accordingly, CCA's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket Entry No. 91) is **DENIED**, and CCA's Motion for Limited Jurisdictional Discovery (Docket Entry No. 84) is **DENIED as moot**. CCA's Motion to Stay and for Expedited Ruling (Docket Entry No. 105) is **DENIED**. USON and AOR-OK are **ORDERED** to commence arbitration by May 15, 2007, and to provide the court with a

[17] *Id.* at 10-13.

status report on June 11, 2007, and every 30 days thereafter.

SIGNED at Houston, Texas, on this the 11th day of May, 2007.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20404

In re: OKLAHOMA ONCOLOGY & HEMATOLOGY PC, doing business as Cancer Care Associates

Petitioner

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Jul. 17, 2007)

Before SMITH, WIENER, and OWEN, Circuit Court Judges

PER CURIAM:

The Petition for Rehearing En Banc is out of time. The court has allowed the filing of the late petition for rehearing.

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge

Judges King and Clement did not participate in the consideration of the rehearing en banc.

28 U.S.C. § 1335

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

> (1) Two or more adverse claimants, of diverse citizenship as defined in subsection (a) or (d) of section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

9 U.S.C. § 3

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

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9 U.S.C. § 4

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an

order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

ANDREWS
ATTORNEYS **KURTH** LLP

[Address & Phone Numbers Omitted In Printing]

May 15, 2006 [sic]

CM-RRR-70011940000031941383

American Arbitration Association
Central Case Management Center
13455 Noel Road, Suite 1750
Dallas, TX 75240

Re: *Arbitration Proceeding Between Oklahoma Oncology & Hematology, P.C. and AOR Management Company of Oklahoma, Inc. and US Oncology, Inc.*

Gentlemen:

Enclosed for filing are two copies of demand for Arbitration along with exhibits.

By copy of this letter, we are providing counsel for respondent the original Demand for Arbitration with exhibits.

Thank you for your assistance in this matter and should you have any questions, please feel free to contact me.

Very truly yours,

/s/ J. Wiley George
J. Wiley George

09576/esk
Enclosures
cc/enc.: Ms. Lana Jeanne Tyree
CM-RRR-70011940000031941390

[LOGO] American Arbitration Association
Dispute Resolution Services Worldwide

COMMERCIAL ARBITRATION RULES
DEMAND FOR ARBITRATION

MEDIATION: *If you would like the AAA to contact the other parties and attempt to arrange a mediation, please check this box.* ☐ *There is no addition administrative fee for this service.*					
Name of Respondent Oklahoma Oncology & Hematology, P.C.			Name of Representative (if known) Lana Jeanne Tyree		
Address 6151 South Yale			Name of Firm (if applicable) Attorney at Law		
			Representative's Address 4613 Tamarisk Drive		
City Tulsa	State OK	Zip Code 74136-	City Oklahoma City	State OK	Zip Code 73142-
Phone No.	Fax No.		Phone No. 405-302-5698	Fax No. 405-840-5637	
Email Address:			Email Address: okusa13@aol.com		
The named claimant, a party to an arbitration agreement dated March 1, 1995, which provides for arbitration under the Commercial Arbitration Rules of the American Association, hereby demands arbitration.					

THE NATURE OF THE DISPUTE

Dispute over entitlement to funds interplead in the Southern District of Texas.

Dollar Amount of Claim	Other Relief Sought:
$ Approximately $7.7 Million	☒ Attorneys Fees ☒ Interest ☒ Arbitration Costs ☐ Punitive/Exemplary ☐ Other _____

AMOUNT OF FILING FEE ENCLOSED WITH THIS DEMAND (please refer to the fee schedule in the rules for the appropriate fee) $

PLEASE DESCRIBE APPROPRIATE QUALIFICATIONS FOR ARBITRATOR(S) TO BE APPOINTED TO HEAR THIS DISPUTE:

Hearing locale Tulsa (check one)

☐ Requested by Claimant

☒ Locale provision included in the contract

Estimated time needed for hearings overall:	Type of Business:
_____hours or _____days	Claimant Healthcare Management Respondent Physicians' Practice

Is this a dispute between a business and a consumer?

☐ **Yes** ☒ **No**

Does this dispute arise out of an employment relationship? ☐ **Yes** ☒ **No**

If this dispute arises out of an employment relationship, what was/is the employee's annual wage range?

Note: This question is required by California law.
☐ Less than $100,000
☐ $100,000-$250, 000 ☐ Over $250,000

You are hereby notified that copies of our arbitration agreement and this demand are being filed with the American Arbitration Association's Case Management Center, located in (check one) ☐ Atlanta, GA
☒ Dallas, TX ☐ East Providence, RI ☐ Fresno, CA
☐ International Centre, NY, with a request that it commence administration of the arbitration. Under the rules, you may file an answering statement within fifteen days after notice from the AAA.

Signature (may be signed by a representative) /s/ J. Wiley George	Date 5/15/07	Name of Representative J. Wiley George

Name of Claimant AOR Management Co. of Oklahoma, Inc. & US Oncology, Inc.	Name of Firm (if applicable) Andrews Kurth LLP

Address (to be used in connection with this case) 16825 Northchase Drive, Suite 1300			Representative's Address 600 Travis, Suite 4200		
City Houston	State TX	Zip Code 77060-	City Houston	State TX	Zip Code 77002-

Phone No. 832-601-8766	Fax No. 832-601-6688	Phone No. 713-220-3938	Fax No. 713-220-4285

Email Address: phil.watts@usoncology.com	Email Address: wileygeorge@andrewskurth.com

To begin proceedings, please send two copies of this Demand and the Arbitration Agreement, along with the filing fees as provided for in the Rules, to the AAA. Send the original Demand to the Respondent.
Please visit our website at www.adr.org if you would like to file this case online. AAA Customer Service can be reached at 800-778-7879

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JPMORGAN CHASE BANK, N.A.	§ CIVIL ACTION
v.	§ NO. _____
	§ **H 06-0645**
OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C., d/b/a CANCER CARE ASSOCIATES, US ONCOLOGY, INC. and AOR MANAGEMENT COMPANY OF OKLAHOMA, INC.	§ (Filed Feb. 27, 2006)

JPMORGAN CHASE BANK'S ORIGINAL COMPLAINT FOR INTERPLEADER

COMES NOW, Interpleader-Plaintiff JPMorgan Chase Bank, N.A. ("Chase") and files this its Original Petition for Interpleader as follows:

I. PARTIES

A. Stakeholder

1. Interpleader-Plaintiff is a national banking association chartered in Ohio with its principal place of business in Columbus, Ohio and is authorized to do business in Texas.

B. Claimants

2. Interpleader-Defendant Oklahoma Oncology & Hematology, P.C., d/b/a Cancer Care Associates

("Oklahoma Oncology") is an Oklahoma Professional Corporation with its principal place of business at 6151 S. Yale Avenue, Suite 100, Tulsa, Oklahoma 74136. Oklahoma Oncology may be served with process through its registered agent, Alan M. Keller, M.D., at 6151 S. Yale Avenue, Suite 100, Tulsa, Oklahoma 74136.

3. Interpleader-Defendant US Oncology, Inc. ("USON") is a Delaware Corporation with its principal place of business at 16825 Northchase Drive, Suite 1300, Houston, Texas 77060. USON may be served with process through its registered agent, C T Corporation System, at 1021 Main Street, Suite 1150, Houston, Texas 77002.

4. Interpleader-Defendant AOR Management Company of Oklahoma, Inc. ("AOR-OK"), a subsidiary of USON, is a Delaware Corporation with its principal place of business in Houston, Texas. AOR-OK may be served with process through its registered agent, The Corporation Company, at 120 N. Robinson, Suite 735, Oklahoma City, Oklahoma 73102.

II. JURISDICTION AND VENUE

5. Personal jurisdiction over the Interpleader-Defendants may be maintained under FEDERAL RULE OF CIVIL PROCEDURE 4(k)(1)(C) and the Texas Long Arm Statute, TEX. CIV. PRAC. & REM. CODE ANN. 17.041, et seq.

6. This Court has original subject matter jurisdiction over this interpleader action and application for injunctive relief pursuant to 28 U.S.C. §§ 1335 and 2361. Interpleader-Defendants are adverse claimants, of diverse citizenship as defined in 28 U.S.C. 1332(a), who both claim entitlement to funds held by Chase with a value of more than $500. Chase has deposited the disputed funds into the registry of the Court.

7. Venue is proper in the Southern District of Texas, Houston Division, pursuant to 28 U.S.C. § 1391(b)(2) because this interpleader is based upon conflicting claims to funds held by Chase in this district under the terms of various documents executed in part by Chase's predecessor and performable in this district.

III. BACKGROUND

8. Effective March 1, 1995, Oklahoma Oncology engaged Oncology and Hematology Management Partnership ("Oncology Management Partnership"), a Texas General Partnership, to serve as its business manager, which included, among other responsibilities, billing and collection services. A true and correct copy of the Management Services Agreement is attached hereto as ***Exhibit "A"*** and incorporated herein by reference. As part of the Management Services Agreement, Okalahoma Oncology appointed Oncology Management Partnership as its agent and attorney-in-fact and granted Oncology Management

Partnership special power of attorney to open an account in Oklahoma Oncology's name, to deposit amounts collected into the account, to sign checks, drafts, bank notes or other instruments on the account, and to make withdrawals from the account for payments specified in the Management Services Agreement. Oncology Management Partnership was also given authority to collect and receive payments for receivables purchased by Oncology Management Partnership from Oklahoma Oncology. **Exhibit "A," p. 12.**

9. Pursuant to the Management Services Agreement, Oncology Management Partnership opened and maintained Chase lockbox account number XXXXXXX3216 (the "Account") in the name of Oklahoma Oncology. The signatories on the Account were and/or are representatives of Oncology Management Partnership and/or its successor in interest. A true and correct copy of the Signature Cards is attached hereto as ***Exhibit "B"*** and incorporated herein by reference. Both Oncology Management Partnership and Oklahoma Oncology agreed to use the Account subject to Chase's Term and Conditions of Deposit Accounts (the "Deposit Agreement") based on: (1) Oncology Management Partnership representatives' signing of the Signature Card on behalf of Oklahoma Oncology, pursuant to the Management Services Agreement, and (2) Oncology Management Partnership and Oklahoma Oncology's use of the Account.

10. On or about March 3, 1998, Oklahoma Oncology granted a new power of attorney to AOR-OK, appointing AOR-OK as its agent and attorney-in-fact for the purpose of managing Oklahoma Oncology's business. Upon information and belief, AOR-OK, which is a subsidiary of USON, is a successor in interest to the Oncology and Hematology Management Partnership. The language, scope, and authority of the new power of attorney is nearly identical to the previous power of attorney found in the Management Services Agreement. A true and correct copy of the Power of Attorney is attached hereto as ***Exhibit "C"*** and incorporated herein by reference. The Interpleader-Defendants continued to use the Account without interruption, and Oklahoma Oncology confirmed the Account arrangement by subsequently providing a Corporate Secretary's Certificate Regarding Account(s) in which Oklahoma Oncology expressly designated the personnel of AOR-OK as authorized signatories. A true and correct copy of the Corporate Secretary's Certificate Regarding Accounts is attached hereto as ***Exhibit "D"*** and incorporated herein by reference.

11. Recently, Oklahoma Oncology contacted Chase, challenging the authority of AOR-OK representatives to access the Account. Oklahoma Oncology complained that changes were made to the Account and that signatories were authorized or removed on the Account without Oklahoma Oncology's authority. Oklahoma Oncology asserts that it holds complete control of the funds in the Account and that USON

and AOR-OK have no legitimate claim of ownership in the Account. In furtherance of this claim, Oklahoma Oncology's board of directors passed and delivered to Chase corporate resolutions purportedly revoking all prior authorizations of USON and AOR-OK access to the Account and granting only certain specified officers of Oklahoma Oncology access to and authority concerning the Account. A true and correct copy of the February 23, 2006 Oklahoma Oncology Corporate Resolutions is attached hereto as ***Exhibit "E"*** and incorporated herein by reference.

12. In light of this information, on February 14, 2006, Chase placed a hold on withdrawals from the Account, but continued to accept deposits to the Account to minimize the business disruption to all of the Interpleader-Defendants. On February 15, 2006, Chase notified both Oklahoma Oncology and USON of this action taken on the Account.

13. Upon receiving notice of the hold placed on the Account, counsel for USON and AOR-OK immediately drafted a letter to Oklahoma Oncology challenging actions taken to deny AOR-OK access to the Account. Without access to the funds in the Account, not only are USON and AOR-OK unable to perform their obligations under the Management Services Agreement, they are unable to collect on the receivables purchased from Oklahoma Oncology. USON and AOR-OK claim an ownership interest in at least a portion of the funds in the Account to the extent that (1) they are forced to pay Oklahoma Oncology's operational and practice expenses out of pocket, and

(2) they funds constitute receivables purchased from Oklahoma Oncology.

IV. INTERPLEADER

14. Chase is subject to adverse and conflicting rival claims for the funds on deposit in the Account.[1] Chase is unable to determine the validity of these claims or to which party they should be paid and in what amount. Chase is in the position of an innocent stakeholder having a reasonable doubt as to which claimant is entitled to the funds in the Account and is faced with the possibility of multiple liability and incidental costs. Its right to this interpleader is clearly set forth in 28 U.S.C. § 1335. Specifically, both Interpleader-Defendants claim ownership of the funds in the Account.

15. Chase neither has nor claims any interest in the disputed funds and has, at all times, been willing to pay the funds to the person or persons lawfully entitled thereto. Moreover, Chase has in no way colluded with any party concerning the matters of this cause. Finally, Chase hereby deposits the disputed

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[1] The Interpleader-Defendants are also involved in litigation against each other in Oklahoma state court. The Tulsa district court's decision to grant USON's motion to compel arbitration in the matter is currently on appeal to the Oklahoma Supreme Court. *Oklahoma Oncology & Hematology, P.C., DBA, Cancer Car* [sic] *Associates v. U.S. Oncology, Inc. et al.*, Case No. CJ-2005-929 (Tulsa Dist. 2005), *on appeal*, Case No. DF-102673.

funds into the registry of the Court.[2] A true and correct copy of the check in the amount of the disputed funds on deposit at the time of filing, payable to Michael Milby, U.S. District Court Clerk, is attached hereto as ***Exhibit "F"*** and incorporated herein by reference.

V. COSTS AND ATTORNEYS FEES

16. Chase has had to employ the undersigned counsel to prosecute this suit and has agreed to pay reasonable and necessary attorneys' fees for such services. Because Chase is an innocent, disinterested stakeholder and is not in substantial controversy with either of the claimants, it is entitled to recovery of these costs and attorneys fees from those funds. *See Rhoades v. Casey*, 196 F.3d 592, 603 (5th Cir. 1999); *Phillips Petroleum Co. v. Hazlewood*, 534 F.2d 61, 63 (5th Cir. 1976). Moreover, Chase has not contributed to the need for interpleader by acting in bad

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[2] Chase tenders the amount of Four Million Twenty-Nine Thousand Five Hundred Eighty-Nine Dollars and 72/100 ($4,029,589.72) into the registry of the Court, which was the balance of the Account as of Friday, February 24, 2006. Due to the nature of the parties' relationship and the purpose for which the Account was opened, funds continue to be electronically deposited into the Account on a daily basis. As of the date of filing, an additional One Million Four Hundred Fifty-Three Thousand Six Hundred Twenty Dollars and 80/100 ($1,453,620.80) has been deposited into the Account. Therefore, Chase anticipates that it will supplement the interpleader with subsequent deposits into the registry of the Court.

faith or by unduly delaying in seeking relief. *See Murphy v. Travelers Ins. Co.*, 534 F.2d 1155 (5th Cir. 1976).

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, JPMorgan Chase Bank, N.A. prays that, upon final hearing of its petition for interpleader, that JPMorgan Chase Bank be released from all liability to any party on account of the matters relating to any amounts on deposit in the Account under the terms of the Deposit Agreement and other applicable law, that JPMorgan Chase Bank be awarded the recovery of reasonable attorneys' fees incurred and expenses to be paid out of the interplead funds, and that JPMorgan Chase Bank be granted such other and further relief to which may show itself entitled.

Respectfully Submitted,

By: /s/ S. David Smith

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ATTORNEYS FOR INTERPLEADER-PLAINTIFF JPMORGAN CHASE BANK, N.A.

EXHIBIT A

MANAGEMENT SERVICES AGREEMENT

BY AND BETWEEN

ONCOLOGY AND HEMATOLOGY
MANAGEMENT PARTNERSHIP,
A TEXAS GENERAL PARTNERSHIP

AND

OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C.
AN OKLAHOMA PROFESSIONAL CORPORATION

EFFECTIVE MARCH 1, 1995

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MANAGEMENT SERVICES AGREEMENT

THIS MANAGEMENT SERVICES AGREEMENT is made and entered into effective as of March 1, 1995, by and between Oncology and Hematology Management Partnership, a Texas general partnership ("Business Manager"), and Oklahoma Oncology & Hematology, P.C., an Oklahoma professional corporation ("New PC").

RECITALS

This Management Services Agreement is made with reference to the following facts:

A. New PC is a validly existing Oklahoma professional corporation, formed for and engaged in the conduct of a medical practice and the provision of medical services to the general public in and around the Tulsa, Oklahoma City, Norman, Bartlesville, and Stillwater, Oklahoma metropolitan areas through individual physicians who are licensed to practice medicine in the state of Oklahoma and who are employed or otherwise retained by New PC.

B. Business Manager is a validly existing Texas general partnership, which has been duly formed to manage the business aspects of the medical practice of New PC.

C. New PC desires to focus its energies, expertise and time on the practice of medicine and on the delivery of medical services to patients, and to accomplish this goal it desires to delegate the increasingly more complex business functions of its medical practice to persons with business expertise.

D. New PC wishes to engage Business Manager to provide such management, administrative and business services as are necessary and appropriate for the day-to-day administration of the nonmedical aspects of New PC's medical practice in the Practice Territory (as defined below), and Business Manager

desires to provide such services all upon the terms and conditions hereinafter set forth.

E. New PC and Business Manager have determined a fair market value for the services to be rendered by Business Manager, and based on this fair market value, have developed a formula for compensation for Business Manager that will allow the parties to establish a relationship permitting each party to devote its skills and expertise to the appropriate responsibilities and functions.

F. Business Manager is willing to commit significant resources to New PC based upon the expectation that the current shareholders of New PC will continue to practice medicine for New PC in the Practice Territory for five (5) years from the effective date of this Management Services Agreement.

NOW, THEREFORE, in consideration of the mutual terms, covenants and conditions hereinabove and hereinafter set forth, the parties agree as follows:

ARTICLE I. DEFINITIONS

For the purposes of this Management Services Agreement, the following terms shall have the following meanings ascribed thereto, unless otherwise clearly required by the context in which such term is used.

Section 1.1 *Adjusted Gross Revenue*. The term "Adjusted Gross Revenue" shall mean the sum of

Professional Services Revenue and Ancillary Revenue.

Section 1.2 *Adjustments.* The term "Adjustments" shall mean any adjustments on an accrual basis for uncollectible accounts, Medicare, Medicaid and other payor contractual adjustments, discounts, workers' compensation adjustments, professional courtesies, and other reductions in collectible revenue that result from activities that do not result in collectible charges.

Section 1.3 *Ancillary Revenue.* The term "Ancillary Revenue" shall mean all other revenue actually recorded each month (net of Adjustments) that is not Professional Services Revenues or Capitation Revenue and shall include (a) any amounts received by New PC as liquidated damages under Section 4.2 or Section 4.3 of any Physician's employment agreement and (b) any amounts paid to New PC under any Physician's Note (as defined in the Master Transaction Agreement) that has been assigned or has been deemed to have been assigned to New PC under the terms of Section 2.05 of the Master Transaction Agreement.

Section 1.4 *Base Management Fee.* The term "Base Management Fee" shall mean the amount set forth in Section 6.1.

Section 1.5 *Budget.* The term "Budget" shall mean an operating budget and capital expenditure budget for each fiscal year as prepared by Business Manager and adopted by New PC.

Section 1.6 *Business Manager.* The term "Business Manager" shall mean Oncology and Hematology Management Partnership, a Texas general partnership or any entity that succeeds to the interests of Oncology and Hematology Management Partnership, a Texas general partnership and to whom the obligations of Business Manager are assigned and transferred.

Section 1.7 *Business Manager Consent.* The term "Business Manager Consent" shall mean the consent granted by Business Manager's representatives (or either representative) to the Policy Board created pursuant to Article III herein. When any provision of this Management Services Agreement requires Business Manager Consent, Business Manager Consent shall not be unreasonably withheld and shall be binding on Business Manager.

Section 1.8 *Business Manager Expense.* The term "Business Manager Expense" shall mean an expense or cost incurred by the Business Manager and for which the Business Manager, and not New PC, is financially liable. Business Manager Expense shall specifically include the costs of American Oncology Resources, Inc. ("AOR") corporate personnel and the travel costs of such corporate personnel. Third party expenses incurred by Business Manager or AOR that directly benefit New PC may be allocated to Office Expense.

Section 1.9 *Capitation Revenues.* The term "Capitation Revenues" shall mean all collections from

managed care organizations or third party payers where such payment is made periodically on a per member basis for the partial or total medical needs of a subscribing patient. Capitation Revenues shall include any co-payments and incentive bonuses received, as a result of a capitation plan, Capitation Revenues shall be allocated between Professional Services Revenue and Ancillary Revenue.

Section 1.10 *Confidential Information.* The term "Confidential Information" shall mean any information of Business Manager or New PC, as appropriate (whether written or oral), including all notes, studies, patient lists, information, forms, business or management methods, marketing data, fee schedules, or trade secrets of the Business Manager or of New PC, as applicable, whether or not such Confidential Information is disclosed or otherwise made available to one party by the other party pursuant to this Management Services Agreement. Confidential Information shall also include the terms and provisions of this Management Services Agreement and any transaction or document executed by the parties pursuant to this Management Services Agreement. Confidential Information does not include any information that (i) is or becomes generally available to and known by the public (other than as a result of an unpermitted disclosure directly or indirectly by the receiving party or its affiliates, advisors, or Representatives); (ii) is or becomes available to the receiving party on a nonconfidential basis from a source other than the furnishing party or its affiliates,

advisors, or Representatives, provided that such source is not and was not bound by a confidentiality agreement with or other obligation of secrecy to the furnishing party of which the receiving party has knowledge at the time of such disclosure; or (iii) has already been or is hereafter independently, acquired or developed by the receiving party without violating any confidentiality agreement with or other obligation of secrecy to the furnishing party.

Section 1.11 *GAAP*. The term "GAAP" shall mean generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other entity or other practices and procedures as may be approved by a significant segment of the accounting profession, which are applicable to the circumstances as of the date of the determination. For purposes of this Management Services Agreement, GAAP shall be applied on an accrual basis in a manner consistent with the historic practices of the person to which the term applies.

Section 1.12 *Management Fee*. The term "Management Fee" shall mean Business Manager's compensation established as described in Article VI hereof.

Section 1.13 *Management Services*. The term "Management Services" shall mean the business,

administrative, and management services to be provided for New PC, including without limitation the provision of equipment, supplies, support services, nonmedical personnel, office space, management, administration, financial recordkeeping and reporting, and other business office services.

Section 1.14 *Management Services Agreement.* The term "Management Services Agreement" shall mean this Management Services Agreement by and between New PC and Business Manager and any amendments hereto as may be adopted as provided in this Management Services Agreement.

Section 1.15 *Master Transaction Agreement.* The term "Master Transaction Agreement" shall mean the agreement effective as of March 1, 1995, by and between American Oncology Resources, Inc. ("AOR"), AOR Management Company of Oklahoma, Cancer Care Associates, Inc., New PC, George W. Schnetzer, III, M.D., John M. Sexauer, M.D., Alan M. Keller, M.D., James A. Young, M.D., Charles M. Strnad [sic], M.D., John B. Benear, II, M.D., Kevin S. Weibel, D.O., Brian V. Geister, M.D., Gregory A. Parker, M.D., Charles W. Hollen, M.D., William L. Hughes, M.D., Christopher A. Puckett, M.D., Craig L. Reitz, M.D., Michael J. Keefer, M.D., Ronald B. Kubica, M.D., Maril J. Weber, M.D., and Aleda A. Toma, M.D.

Section 1.16 *Medical Services.* The term "Medical Services" shall mean medical care and services, including but not limited to the practice of hematology

and oncology and all related health care services provided by New PC through New PC's Physicians and other health care providers that are retained by or professionally affiliated with New PC.

Section 1.17 *New PC.* The term "New PC" shall mean Oklahoma Oncology & Hematology, P.C., an Oklahoma professional corporation.

Section 1.18 *New PC Account.* The term "New PC Account" shall mean the bank account of New PC established as described in Sections 4.8 and 4.9.

Section 1.19 *New PC Consent.* The term "New PC Consent" shall mean the consent granted by New PC's representatives (or either representative) to the Policy Board created pursuant to Article III herein. When any provision of this Management Services Agreement requires New PC Consent, New PC Consent shall not be unreasonably withheld and shall be binding on New PC.

Section 1.20 *New PC Expense.* The term "New PC Expense" shall mean an expense incurred by the Business Manager or New PC and for which New PC, and not the Business Manager, is financially liable. New PC Expense shall include such items as Physician salaries, benefits, and other direct costs (including professional dues, subscriptions, continuing medical education expenses, and travel costs for continuing medical education or other business travel but excluding business travel requested by Business Manager or AOR, which shall be an Office Expense). In the event New PC incurs consulting, accounting or

legal fees without coordinating such engagement through Business Manager, all fees and expenses so incurred shall be New PC Expenses.

Section 1.21 *Office.* The term "Office" shall mean any office space, clinic, facility, including satellite facilities, that Business Manager shall own or lease or otherwise procure for the use of New PC.

Section 1.22 *Office Expense.* The term "Office Expense" shall mean all operating and nonoperating expenses incurred by the Business Manager or New PC in the provision of services to New PC. Office Expense shall not include any State or federal income tax, any CCA Medical Assets or Toma Medical Assets (each as defined in the Master Transaction Agreement), any payment by AOR on the Note (as defined in Section 1.44 of the Master Transaction Agreement), or any other expense that is a New PC Expense or a Business Manager Expense. Without limitation, Office Expense shall include:

(a) the salaries, benefits, and other direct costs of all employees of Business Manager at the Office and the salaries, benefits, and other direct costs of the nonphysician employees of New PC, but not the salaries, benefits, or other direct costs of the Physicians;

(b) the direct cost of any employee or consultant that provides services at or in connection with the Office for improved clinic performance, such as management, billing and collections, business office consultation, accounting and legal services, but only

when such services are coordinated by Business Manager;

(c) reasonable recruitment costs and out-of-pocket expenses of Business Manager or New PC associated with the recruitment of additional physician employees of New PC;

(d) malpractice insurance expenses for Physicians, Business Manager employees, and nonphysician employees and comprehensive and general liability insurance covering the Office and employees of New PC and Business Manager at the Office;

(e) the expense of using, leasing, purchasing or otherwise procuring the Office and related equipment, including depreciation but not including monies paid by third parties;

(f) the cost of capital (whether as actual interest on indebtedness incurred on behalf of New PC or as reasonable imputed interest on capital advanced by Business Manager, which shall be equal to the average cost of borrowing by AOR as reflected on its most recent published financial statements) to finance or refinance obligations of New PC, purchase medical or nonmedical equipment, or finance new ventures of New PC;

(g) the Base Management Fee;

(h) costs related to Capitation Revenue allocated by the Policy Board for the purchase of professional medical services or health care services from

medical or health care providers not associated with New PC;

(i) the reasonable travel expenses (except for the corporate staff of AOR) associated with attending meetings, conferences, or seminars to benefit New PC; and

(j) the cost of medical supplies (including but not limited to drugs, pharmaceuticals, products, substances, items, or medical devices), office supplies, inventory, and utilities other than those medical supplies or medical inventory owned by New PC on the date of this Management Services Agreement.

Section 1.23 *Performance Fee*. The term "Performance Fee" shall mean the amount payable to the Business Manager, if any, determined under Section 6.2, as a Management Fee based upon the Business Manager assisting New PC to achieve certain predetermined performance criteria.

Section 1.24 *Physician*. The term "Physician" shall mean each individually licensed professional who is employed or otherwise retained by or associated with New PC, each of whom shall meet at all times the qualifications described in Section 5.2 and Section 5.3.

Section 1.25 *Practice Territory*. The term "Practice Territory" shall mean the geographic area within a radius of thirty (30) miles of any current or future facility from which New PC provides Medical Services

in Oklahoma, representing the geographic boundaries of the medical practice conducted by New PC.

Section 1.26 *Professional Services Revenues.* The term "Professional Services Revenues" shall mean the sum of (i) all professional fees actually recorded each month on an accrual basis under GAAP (net of Adjustments) as a result of professional medical services and related health care services rendered by the shareholders and physician employees of New PC, whether rendered in an outpatient or inpatient setting, and (ii) Capitation Revenues allocated to Professional Services Revenues.

Section 1.27 *Representatives.* The term "Representatives" shall mean a party's officers, directors, employees, or other agents or representatives.

Section 1.28 *State.* The term "State" shall mean the State of Oklahoma.

Section 1.29 *Term.* The term "Term" shall mean the initial and any renewal periods of duration of this Management Services Agreement as described in Section 7.1.

ARTICLE II. APPOINTMENT AND AUTHORITY OF BUSINESS MANAGER

Section 2.1 *Appointment.* New PC hereby appoints Business Manager as its sole and exclusive agent for the management, and administration of the business functions and business affairs of New PC, and Business Manager hereby accepts such

appointment, subject at all times to the provisions of this Management Services Agreement.

Section 2.2 *Authority*. Consistent with the provisions of this Management Services Agreement, Business Manager shall have the responsibility and commensurate authority to provide Management Services for New PC. Subject to the terms and conditions of this Management Services Agreement, Business Manager is hereby expressly authorized to provide the Management Services in any reasonable manner Business Manager deems appropriate to meet the day-to-day requirements of the business functions of New PC. Business Manager is also expressly authorized to negotiate and execute on behalf of New PC contracts that do not relate to the provision of Medical Services. New PC shall give Business Manager thirty (30) days prior notice of New PC's intent to execute any agreement obligating New PC to perform Medical Services or otherwise creating a binding legal obligation on New PC. Unless an expense is expressly designated as a Business Manager Expense in this Management Services Agreement, all expenses incurred by Business Manager in providing services pursuant to this Management Services Agreement shall be an Office Expense. The parties acknowledge and agree that New PC, through its Physicians, shall be responsible for and shall have complete authority, responsibility, supervision, and control over the provision of all Medical Services and other professional health care services performed for patients, and that all diagnoses, treatments, procedures, and

other professional health care services shall be provided and performed exclusively by or under the supervision of Physicians as such Physicians, in their sole discretion, deem appropriate. Business Manager shall have and exercise absolutely no control or supervision over the provision of Medical Services.

Section 2.3 *Patient Referrals.* Business Manager and New PC agree that the benefits to New PC hereunder do not require, are not payment for, and are not in any way contingent upon the referral, admission, or any other arrangement for the provision of any item or service offered by Business Manager to patients of New PC in any facility, laboratory, infusion center, or health care operation controlled, managed, or operated by Business Manager.

Section 2.4 *Internal Management of New PC.* Matters involving the internal management, control, or finances of New PC, including specifically the allocation of professional income among the shareholders and Physician employers of New PC, tax planning, and investment planning, shall remain the responsibility of New PC and the shareholders of New PC.

Section 2.5 *Practice of Medicine.* The parties acknowledge that Business Manager is not authorized or qualified to engage in any activity that may be construed or deemed to constitute the practice of medicine. To the extent any act or service herein required by Business Manager should be construed by a court of competent jurisdiction or by the Oklahoma

State Board of Medical Licensure and Supervision to constitute the practice of medicine, the requirement to perform that act or service by Business Manager shall be deemed waived and unenforceable.

ARTICLE III.
RESPONSIBILITIES OF THE POLICY BOARD

Section 3.1 *Formation and Operation of the Policy Board.* The parties hereby establish a Policy Board which shall be responsible for developing and implementing management and administrative policies for the overall operation of New PC's facilities. The Policy Board shall consist of four (4) members. Business Manager shall designate, in its sole discretion, two (2) members of the Policy Board. New PC shall designate, in its sole discretion, two (2) members of the Policy Board. The Policy Board members selected by New PC shall be full-time physician employees of New PC practicing in the Practice Territory. Each party's representatives to the Policy Board shall have the authority to make decisions on behalf of the respective party. Except as may otherwise be provided, the act of a majority of the members of the Policy Board shall be the act of the Policy Board.

Section 3.2 *Duties and Responsibilities of the Police Board.* The Policy Board shall have the following duties, obligations, and authority:

(a) *Capital Improvements and Expansion.* Any renovation and expansion plans and capital equipment expenditures with respect to New PC's facilities shall be reviewed and approved by the Policy Board and shall be based upon economic feasibility, physician support, productivity and then current market conditions.

(b) *Marketing and Advertising.* All marketing and other advertising of the services performed at New PC's facilities shall be subject to the prior review and approval of the Policy Board.

(c) *Patient Fees: Collection Policies.* As a part of the annual operating budget, in consultation with New PC and Business Manager, the Policy Board shall review and approve the fee schedule and collection policies for all physician and ancillary services rendered by New PC.

(d) *Ancillary Services.* The Policy Board shall approve New PC-provided ancillary services based upon the pricing, access to and quality of such services.

(e) *Provider and Payer Relationships.* Decisions regarding the establishment or maintenance of relationships with institutional health care providers and third party payors shall be approved by the Policy Board in consultation with New PC. The Policy Board shall review and approve discounted fee schedules, including capitated fee arrangements, and shall allocate revenue generated from capitation contracts.

(f) *Strategic Planning.* The Policy Board shall develop long-term strategic planning objectives.

(g) *Capital Expenditures.* The Policy Board shall determine the priority of major capital expenditures.

(h) *Physician Hiring.* The Policy Board shall recommend to New PC the number and type of physicians required for the efficient operation of New PC's facilities. The Policy Board shall review and approve any variations to the restrictive covenants in any physician employment contract.

(i) *Fee Dispute Resolution.* Upon submission by New PC of a dispute concerning a set-off or reduction in Management Fees, the Policy Board shall consider, develop, and implement a resolution to New PC and Business Manager.

(j) *Grievance Referrals.* The Policy Board shall consider and make recommendations to New PC regarding grievances pertaining to matters not specifically addressed in this Management Services Agreement as referred to it by New PC's Board of Directors.

Section 3.3 *Medical Decisions.* Despite the above listing of activities and areas of interest, all medical decisions will be made solely by physicians, but nonphysician members of the Policy Board may participate in the discussion process. The physician members of the Policy Board shall review and resolve issues relating to:

(a) Types and levels of Medical Services to be provided;

(b) Recruitment of physicians to New PC, including the specific qualifications and specialties of recruited physicians;

(c) Acquisition of or merger with any other medical practices in the Practice Territory;

(d) Fee schedules; and

(e) Any other function or decision that the parties agree is medical related.

The Policy Board meetings shall be held as mutually agreed, but at least quarterly, in Oklahoma. Meetings shall be open to any shareholder in New PC.

Section 3.4 *Formation of Oklahoma Oncology Associates.* If New PC becomes a partner in Oklahoma Oncology Associates ("OOA") pursuant to Section 2.05 of the Master Transaction Agreement, the Policy Board formed pursuant to Section 3.1 of this Management Services Agreement shall be terminated, and the Policy Board shall be replaced by the Joint Policy Board formed pursuant to the Affiliation Agreement (as defined in the Master Transaction Agreement). In addition, New PC agrees that it shall fully cooperate with Business Manager to obtain a provider number for OOA that it shall cease to use its provider number when OOA obtains a provider number, and that it shall begin to use the provider number of OOA.

ARTICLE IV. COVENANTS AND RESPONSIBILITIES OF BUSINESS MANAGER

During the Term, Business Manager shall provide all Management Services as are necessary and appropriate for the day-to-day administration of the business aspects of New PC's operations, including without limitation those set forth in this Article IV in accordance with all law, rules, regulations and guidelines applicable to the provision of Management Services.

Section 4.1 Office and Equipment.

(a) Subject to Section 4.1(b), as necessary and appropriate, taking into consideration the professional concerns of New PC, Business Manager shall lease, acquire or otherwise procure an Office in a location or locations reasonably acceptable to New PC and shall permit New PC to use the Office. Any Office procured by Business Manager for the use by New PC shall be procured at commercially reasonable rates. Any move from New PC's present practice location(s) shall be done only after Business Manager has received New PC's Consent.

(b) In the event New PC is the lessee of the Office under a lease with an unrelated and nonaffiliated lessor, Business Manager may require New PC to assign such lease to Business Manager upon receipt of consent from the lessor. New PC shall use its best efforts to assist in obtaining the lessor's consent to the assignment. Upon request, New PC shall execute any instruments and shall take any acts

that Business Manager may deem necessary to accomplish the assignment of the lease. Any expenses incurred in the assignment shall be Office Expenses.

(c) Business Manager shall provide all non-medical equipment, fixtures, office supplies, furniture and furnishings deemed reasonably necessary by Business Manager for the operation of the Office and reasonably necessary for the provision of Medical Services.

(d) Business Manger shall provide, finance, or cause to be provided or financed medical related equipment as required by New PC. Subject to economic feasibility, New PC shall have final authority in all medical equipment selections, and Business Manager shall have no authority in regard to medical equipment selection issues. Business Manager may, however, advise New PC on the relationship between its medical equipment decisions and the overall administrative and financial operations of the practice. All medical and nonmedical equipment, other than physician-owned automobiles, acquired for the use of New PC shall be owned by Business Manager.

(e) Business Manager shall be responsible for the repair and maintenance of the Office, consistent with Business Manager's responsibilities under the terms of any lease or other use arrangement, and for the repair, maintenance and replacement of all equipment other than such repairs, maintenance and replacement necessitated by the negligence or willful misconduct of New PC, its Physicians or other

personnel employed by New PC, the repair or replacement of which shall be a New PC Expense and not an Office Expense.

Section 4.2 *Medical Supplies.* Business Manager shall order, procure, purchase and provide on behalf of and as agent for New PC all reasonable medical supplies unless otherwise prohibited by federal and/or State law. Furthermore, Business Manager shall ensure that the office is at all times adequately stocked with the medical supplies that are necessary and appropriate for the operation of New PC and required for the provision of Medical Services. The ultimate oversight, supervision and ownership for all medical supplies is and shall remain the sole responsibility of New PC. As used in this provision the term "medical supplies" shall mean all drugs, pharmaceuticals, products, substances, items or devices whose purchase, possession, maintenance, administration, prescription or security requires the authorization or order of a licensed health care provider or requires a permit, registration, certification or other governmental authorization held by a licensed health care provider as specified under any federal and/or State law.

Section 4.3 *Support Services.* Business Manger shall provide or arrange for all printing, stationery, forms, postage, duplication or photocopying services, and other support services as are reasonably necessary and appropriate for the operation of the Office and the provision of Medical Services therein.

Section 4.4 *Quality Assurance, Risk Management, and Utilization Review.* Business Manager shall assist New PC in New PC's establishment and implementation of procedures to ensure the consistency, quality, appropriateness, and medical necessity of Medical Services provided by New PC, and shall provide administrative support for New PC's overall quality assurance, risk management, and utilization review programs. Business Manager shall perform these tasks in a manner to ensure the confidentiality and nondiscoverability of these program actions to the fullest extent allowable under State and federal law.

Section 4.5 *Licenses and Permits.* Business Manger shall, on behalf of and in the name of New PC, coordinate all development and planning processes, and apply for and use reasonable efforts to obtain and maintain all federal, State, and local licenses and regulatory permits required for or in connection with the operation of New PC and equipment (existing and future) located at the Office, other than those relating to the practice of medicine or the administration of drugs by Physicians retained by or associated with New PC.

Section 4.6 *Personnel.* Except as specifically provided in Section 5.2(b) of this Management Services Agreement, Business Manager shall, consistent with the Budget, employ or otherwise retain and shall be responsible for selecting, hiring, training, supervising, and terminating, all management, administrative, clerical, secretarial, bookkepping,

accounting, payroll, billing and collection and other nonprofessional personnel as Business Manager deems reasonably necessary and appropriate for Business Manger's performance of its duties and obligations under this Management Services Agreement. Business Manager shall have sole responsibility for determining the salaries and providing such fringe benefits, and for withholding, as required by law, any sums for income tax, unemployment insurance, social security, or any other withholding required by applicable law or governmental requirement.

Section 4.7 *Contract Negotiations.* Upon the request of New PC, Business Manager shall advise New PC with respect to and negotiate, either directly or on New PC's behalf, as appropriate, all contractual arrangements with third parties as are reasonably necessary and appropriate for New PC's provision of Medical Services, including, without limitation, negotiated price agreements with third party payors, alternative delivery systems, or other purchasers of group health care services. No contract or arrangement regarding the provision of Medical Services or the payment therefore shall be entered into without New PC Consent.

Section 4.8 *Billing and Collection.* On behalf of and for the account of New PC, Business Manger shall establish and maintain credit and billing and collection policies and procedures, and shall timely bill and collect all professional and other fees for all billable Medical Services provided by New PC, or

Physicians employed or otherwise retained by New PC. Business Manager shall advise and consult with New PC regarding the fees for Medical Services provided by New PC; it being understood, however, that New PC shall establish the fees to be charged for Medical Services and that Business Manager shall have no authority whatsoever with respect to the establishment of such fees. In connection with the billing and collection services to be provided hereunder, and throughout the Term (and thereafter as provided in Section 7.3), New PC hereby grants to Business Manager an exclusive special power of attorney and appoints Business Manager as New PC's exclusive true and lawful agent and attorney-in-fact, and Business Manager hereby accepts such special power of attorney and appointment, for the following purposes:

(a) To bill New PC's patients, in New PC's name and on New PC's behalf, for all billable Medical Services provided by New PC to patients.

(b) To bill, in New PC's name and on New PC's behalf, all claims for reimbursement or indemnification from Blue Shield/Blue Cross, insurance companies, Medicare, Medicaid, and all other third party payors or fiscal intermediaries for all covered billable Medical Services provided by New PC to patients.

(c) To collect and receive in Business Manger's name and for Business Manger's account all accounts receivable of New PC purchased by Business Manager, and to deposit such collections in an account

selected by Business Manager and maintained in Business Manager's name.

(d) To collect and receive, in New PC's name and on New PC's behalf, all accounts receivable generated by such billings and claims for reimbursement that have not been purchased by Business Manager, to administer such accounts including, but not limited to, (i) extending the time of payment of any such accounts for cash, credit or otherwise; (ii) discharging or releasing the obligors of any such accounts; (iii) with the consent of the Policy Board, suing, assigning or selling at a discount such accounts to collection agencies; or (iv) with the consent of the Policy Board, taking other measures to require the payment of any such accounts.

(e) To deposit all amounts collected into New PC Account which shall be and at all times remain in New PC's name. New PC covenants to transfer and deliver to Business Manger for deposit into New PC Account or itself to make such deposit of all funds received by New PC from patients or third party payors for Medical Services. Upon receipt by Business Manager of any funds from patients or third party payors or from New PC pursuant hereto for Medical Services, Business Manager shall immediately deposit same into the New PC Account. Business Manager shall disburse such deposited funds to creditors and other persons on behalf of New PC, maintaining records of such receipt and disbursement of funds as directed by New PC.

(f) To take possession of, endorse in the name of New PC, and deposit into the New PC Account any notes, checks, money orders, insurance payments, and any other instruments received in payment for Medical Services.

(g) To sign checks, drafts, bank notes or other instruments on behalf of New PC, and to make withdrawals from the New PC Account for payments specified in this Management Services Agreement and as requested from time to time by New PC.

Upon request of Business Manager, New PC shall execute and deliver to the financial institution wherein the New PC Account is maintained, such additional documents or instruments as may be necessary to evidence or effect the special and limited power of attorney granted to Business Manager by New PC pursuant to this Section 4.8 or pursuant to Section 4.9 of this Management Services Agreement. The special and limited power of attorney granted herein shall be coupled with an interest and shall be irrevocable except with Business Manager's written consent. The irrevocable power of attorney shall expire on the later of when this Manager Services Agreement has been terminated, when all accounts receivable purchased by Business Manager have been collected, or when all Management Fees due to Business Manager have been paid. If Business Manager assigns this Management Services Agreement in accordance with this terms, then New PC shall execute a power of attorney in favor of the assignee and in the form of Exhibit 4.8 attached hereto.

Section 4.9 *New PC Account.*

(a) *Power of Attorney.* Business Manager shall have access to the New PC Account solely for the purposes stated herein. In connection herewith and throughout the Term (and thereafter as provided in Section 7.3), New PC hereby grants to Business Manager an exclusive special power of attorney for the purposes herein and appoints Business Manager as New PC's exclusive true and lawful agent and attorney-in-fact, and Business Manager hereby accepts such special power of attorney and appointment, to deposit into the New PC Account all funds, fees, and revenues generated from the New PC's provision of Medical Services and collected by Business Manager, and to make withdrawals from New PC Account for payments specified in this Management Services Agreement and as requested from time-to-time by New PC. Notwithstanding the exclusive special power of attorney granted to Business Manager hereunder, New PC may, upon reasonable advance notice to Business Manager, draw checks on the New PC Account; provided, however, that New PC shall neither draw checks on the New PC Account nor request Business Manager to do so if the balance remaining in the New PC Account after such withdrawal would be insufficient to enable Business Manager to pay on behalf of New PC any office expense attributable to the operations of New PC or to the provision of Medical Services, and/or any other obligations of New PC. Disbursements made without prior New PC. Consent shall be consistent with the

type and amount of expenditures authorized by the Budget. Limits on authority to sign checks and purchase orders shall be mutually agreed upon by Business Manager and New PC's representatives to the Policy Board (or Joint Policy Board).

(b) *Priority of Payments.* Each month Business Manager shall apply funds that are in the New PC account in the following order of priority:

(1) to Business Manager, Office Expenses, except the Base Management Fee;

(2) to New PC, New PC Expenses;

(3) to Business Manager, the Base Management Fee;

(4) to Business Manager, any Performance Fee to which Business Manager may be entitled; and

(5) the remaining balance shall be paid as directed by New PC.

Section 4.10 *Fiscal Matters.*

(a) *Annual Budget.*

(1) *Initial Budget.* The initial Budget shall be agreed upon by the parties before the execution of this Management Services Agreement. To assure that New PC receives the full amount of the charges for the provision of professional services, in the initial Budget, New PC shall retain for New PC Expenses twenty-three percent (23%) of the Adjusted Gross Revenue. The initial Budget shall set forth the criteria

under which Business Manager shall be entitled to receive the Performance Fee and the Budget shall also set forth the amount of the Performance Fee.

(2) *Process for Succeeding Budgets.* Annually and at least thirty (30) days prior to the commencement of each fiscal year of New PC, Business Manager, in consultation with either one (1) of New PC's representatives to the Policy Board (or Joint Policy Board), shall prepare and deliver to New PC for New PC's approval a proposed Budget, setting forth an estimate of New PC's revenues and expenses for the upcoming fiscal year (including, without limitation, the Management Fee and Performance Fee associated with the services provided by Business Manager hereunder). New PC shall review the proposed Budget and either approve the proposed Budget or request any changes within fifteen (15) days after receiving the proposed Budget. The Budget shall be adopted by New PC after reasonable review and comment and may be revised or modified only in consultation with the Business Manager.

(3) *Succeeding Budgets: Special Rates.* In each succeeding Budget, unless the parties otherwise mutually agree, New PC shall continue to retain for New PC Expenses twenty-three percent (23%) of the Adjusted Gross Revenue. In each succeeding Budget, unless the parties otherwise mutually agree, the criteria for the Performance Fee and Business Manager's right to receive the Performance Fee shall be continued on the same basis. If the option is exercised

pursuant to that certain Option Agreement of even date herewith between the shareholders of New PC and Lloyd K. Everson, M.D. such that Dr. Everson becomes the controlling shareholder of New PC, the amount of the Performance Fee and method determining the Performance Fee for all succeeding years shall not be changed and shall be determined exactly as specified in the last Budget approved before the exercise of the option, and the New PC shall continue to retain twenty-three percent (23%) of the Adjusted Gross Revenue for New PC Expense through the Term.

(4) *Deadlock.* In the event the parties are unable to agree on a Budget by the beginning of the fiscal year, until an agreement is reached, the Budget for the prior year shall be deemed to be adopted as the Budget for the current year, with each line item in the Budget (with the exception of the Base Management Fee) increased or decreased by (i) the percentage by which the Adjusted Gross Revenue in the current year has increased or decreased compared to the corresponding period of the prior year; (ii) the increase of decrease from the prior year in the Consumer Price Index – Health/Medical Services, Tulsa, Oklahoma area; and (iii) the proportionate increase or decrease in mutually agreed upon personnel costs as measured by the increase or decrease in full-time-equivalent personnel.

(5) *Obligation of Business Manager.* Business Manager shall use commercially reasonable efforts to manager and administer the operations of New PC as herein provided so that the actual revenues, costs and expenses of the operation

and maintenance of New PC during any applicable period of New PC's fiscal year shall be consistent with the Budget.

(b) *Accounting and Financial Records.* Business Manager shall establish and administer accounting procedures, controls, and systems for the development, preparation, and safekeeping of administrative or financial records and books of account relating to the business and financial affairs of New PC and the provision of Medical Services all of which shall be prepared and maintained in accordance with GAAP and applicable laws and regulations. Business Manager shall prepare and deliver to New PC, within ninety (90) days of the end of each calendar year, a balance sheet and a profit and loss statement reflecting the financial status of New PC in regard to the provision of Medical Services as of the end of such calendar year, all of which shall be prepared in accordance with GAAP consistently applied. In addition, Business Manager shall prepare or assist in the preparation of any other financial statements or records as New PC may reasonably request.

(c) *Review of Expenditures.* Either one of New PC's representatives to the Policy Board (or Joint Policy Board) shall review all expenditures related to the operation of New PC, but neither shall have the power to prohibit or invalidate any expenditure that is consistent with the Budget. Business Manager shall not have any authority to make any expenditures not consistent with the Budget without New PC Consent.

(d) *Tax Matters.*

(1) *In General.* Business Manager shall prepare or arrange for the preparation by an accountant approved in advance by New PC (which approval shall not be unreasonably withheld) of all appropriate tax returns and reports required of New PC.

(2) *Sales and Use Taxes.* Business Manager and New PC acknowledge and agree that to the extent that any of the services to be provided by Business Manager hereunder may be subject to any State sales and use taxes, Business Manager may have a legal obligation to collect such taxes from New PC and to remit same to the appropriate tax collection authorities. New PC agrees to pay in addition to the payment of the Management Fee, the applicable State sales and use taxes in respect of the portion of the Management Fees attributable to such services.

Section 4.11 *Reports and Records.*

(a) *Medical Records.* Business Manger shall establish, monitor, and maintain procedures and policies for the timely creation, preparation, filing and retrieval of all medical records generated by New PC in connection with New PC's provision of Medical Services; and, subject to applicable law, shall ensure that medical records are promptly available to Physicians and any other appropriate persons. All such

medical records shall be retained and maintained in accordance with all applicable State and federal laws relating to the confidentiality and retention thereof. All medical records shall be and remain the property of New PC.

(b) *Other Reports and Records.* Business Manager shall timely create, prepare, and file such additional reports and records as are reasonably necessary and appropriate for New PC's provision of Medical Services, and shall be prepared to analyze and interpret such reports and records upon the request of New PC.

Section 4.12 *Requirement of New PC Physicians.* Upon New PC's request, Business Manager shall perform all administrative services reasonably necessary and appropriate to recruit potential physician personnel to become employees of New PC. Business Manager shall provide New PC with model agreements to document New PC's employment, retention or other service arrangements with such individuals. It will be and remain the sole and complete responsibility of New PC to interview, select, contract with, supervise, control and terminate all Physicians performing Medical Services or other professional services, and Business Manager shall have no authority whatsoever with respect to such activities.

Section 4.13 *Confidential and Proprietary Information.*

(a) Business Manager will not disclose any Confidential Information of New PC to other persons without New PC's express written authorization, such Confidential Information will not be used in any way directly or indirectly detrimental to New PC, and Business Manager will keep such Confidential Information confidential and will ensure that its affiliates and advisors who have access to such Confidential Information comply with these nondisclosure obligations; provided, however, that Business Manager may disclose Confidential Information to those of its Representatives who need to know Confidential Information for the purposes of this Management Services Agreement, it being understood and agreed to by Business Manager that such Representatives will be informed of the confidential nature of the Confidential Information, will agree to be bound by this Section, and will be directed by Business Manager not to disclose to any other person any Confidential Information. Business Manager agrees to be responsible for any breach of this Section by its affiliates, advisors, or Representatives. If Business Manager is requested or required (by oral questions, interrogatories, requests for information or documents, subpoenas, civil investigative demands, or similar processes) to disclose or produce any Confidential Information furnished in the course of its dealings with New PC or its affiliates, advisors, or Representatives, Business Manager will (i) provide

New PC with prompt notice thereof and copies, if possible, and, if not, description, of the Confidential Information requested or required to be produced so that New PC may seek an appropriate protective order or waive compliance with the provisions of this Section and (ii) consult with New PC as to the advisability of New PC's taking of legally available steps to resist or narrow such request. Business Manger further agrees that, if in the absence of a protective order or the receipt of a waiver hereunder Business Manager is nonetheless, in the written opinion of its legal counsel, compelled to disclose or produce Confidential Information concerning New PC to any tribunal legally authorized to request and entitled to receive such Confidential Information or to stand liable for contempt or suffer other censure or penalty, Business Manger may disclose or produce such Confidential Information to such tribunal without liability hereunder; provided, however, that Business Manager shall give New PC written notice of the Confidential Information to be so disclosed or produced as far in advance of its disclosure or production as is practicable and shall use its best efforts to obtain, to the greatest extent practicable, an order or other reliable assurance that confidential treatment will be accorded to such Confidential Information so required to be disclosed or produced.

(b) Notwithstanding clause (a) above, Business Manager may share, subject to the restrictions of this section, with other professional corporations, associations, medical practices, or health care delivery

entities the practice statistics of New PC, including utilization review data, quality assurance data, cost data, outcomes data, or other practice data. The practice statistics may be disclosed within New PC, to AOR or AOR's management, to other medical groups with whom Business Manager has a management relationship, to managed care providers or other third party payors for the purpose of obtaining or maintaining third party payor contracts, or to financial analysis and underwriters; provided that any disclosure outside of New PC or AOR for any purpose not related to managed care contracting shall not identify any Physician by name without New PC Consent. In addition, Business Manager may disclose all practice-related information necessary or desirable in connection with any public or private offering of any AOR security, but no such data will disclose or divulge patient identifying information.

Section 4.14 *Business Manager's Insurance.* Throughout the Term, Business Manager shall, as an Office Expense, obtain and maintain with commercial carriers, through self-insurance or some combination thereof, appropriate worker's compensation coverage for Business Manager's employed personnel provided pursuant to this management Services Agreement, and professional, casualty and comprehensive general liability insurance covering Business Manager, Business Manager's personnel, and all of Business Manager's equipment in such amounts, on such basis and upon such terms and conditions as Business Manager deems appropriate. Upon the request of

New PC, Business Manager shall provide New PC with a certificate evidencing such insurance coverage. Business Manager may also carry, as an Office Expense, key person life and disability insurance on any shareholder or Physician employee of New PC in amounts determined reasonable and sufficient by Business Manager. Business Manager shall be the owner and beneficiary of any such insurance.

Section 4.15 *No Warranty.* New PC acknowledges that Business Manager has not made and will not make any express or implied warranties or representations that the services provided by Business Manager will result in any particular amount or level of medical practice or income to New PC.

Section 4.16 *Noncompetition Covenant from Business Manager.* Business Manager represents, warrants and covenants that during the Term, neither Business Manager nor any person or entity affiliated directly or indirectly with Business Manager will, anywhere in the Practice Territory, enter into a direct or indirect relationship similar to the relationship between New PC and Business Manager with, or acquire the nonmedical assets of, any medical oncology practice group without approval of the Policy Board.

Section 4.17 *Additional Obligations of Business Manager.* In addition to the duties and obligations specified above in sections 4.1-4.16, Business Manager shall perform the following:

(a) Within a reasonable period of time after execution of this Management Services Agreement, Business Manager shall, as an Office expense, develop and implement data gathering and processing capabilities designed to assist New PC manage the cost of treatment for the major diagnoses treated by New PC. Business Manager shall use such capabilities and the information obtained therefrom to assist New PC obtain and maintain managed care contracts (including, but not limited to, capitation and global pricing arrangements).

(b) Business Manager shall, as an Office Expense, develop New PC and assist New PC in implementing outcomes management and work management systems and other protocols to enable New PC to achieve greater efficiencies in resource utilization.

(c) Business Manager shall commit reasonable resources to pursue, negotiate and maintain managed care contracts on behalf of New PC. Business Manager shall advise New PC on the economic impact of any such managed care contract.

ARTICLE V. COVENANTS AND RESPONSIBILITIES OF NEW PC

Section 5.1 *Organization and Operation.* New PC, as a continuing condition of Business Manager's obligations under this Management Services Agreement, shall at all times during the Term be and remain legally organized and operated to provide Medical Services in a manner consistent with all

State and federal laws. New PC shall operate and maintain within the Practice Territory a full time practice of medicine specializing in the provision of oncology Medical Services, and for the first five (5) years of the term of this Management Services Agreement, New PC shall maintain and enforce employment agreements in the form of Exhibit 5.1 with the shareholders of New PC specified in Exhibit 5.1A. New PC shall not amend the employment agreements in any manner or waive any material rights of New PC thereunder without the prior approval of Business Manager.

Section 5.2 *New PC Personnel.*

(a) *Physician Personnel.* New PC shall retain, as a New PC expense and not as an Office Expense, that number of Physicians, as are reasonably necessary and appropriate in the sole discretion of New PC for the provision of Medical Services. Each Physician retained by New PC shall hold and maintain a valid and unrestricted license to practice medicine in the State, and shall be competent in the practice of oncology, including such subspecialties as medical infusion, radiation therapy or other subspecialties that such Physician will practice on behalf of New PC. New PC shall enter into and maintain with each such retained Physician a written employment agreement substantially in the form of either Exhibit 5.1 for shareholders of New PC or consistent with Exhibit 5.2(a) for nonshareholders and will not commit and permit to remain outstanding any breach of such employment agreement that would allow the

Physician to terminate for cause. New PC shall be responsible for paying the compensation and benefits as applicable, for all Physicians and any other physician personnel or other contracted or affiliated physician, and for withholding, as required by law, any sums for income tax, unemployment insurance, social security, or any other withholding required by applicable law. Business Manager may, on behalf of New PC, establish and administer the compensation with respect to such individuals in accordance with the written agreement between New PC and each Physician. Business Manager shall neither control nor direct any Physician in the performance of Medical Services for patients.

(b) *Nonphysician Health Care Personnel.* All nonphysician health care personnel who provide patient care services in the diagnostic areas shall be employed by or retained by New PC as an Office Expense and shall be under New PC's control, supervision and direction in the performance of Medical Services for patients.

Section 5.3 *Professional Standards.* As a continuing condition of Business Manager's obligations hereunder, each Physician and any other physician personnel retained by New PC to provide Medical Services must (i) comply with, be controlled and governed by and otherwise provide Medical Services in accordance with applicable federal, State and municipal laws, rules, regulations, ordinances and orders, and the ethics and standard of care of the medical community wherein the principal office of

each Physician is located and (ii) obtain and retain appropriate medical staff membership with appropriate clinical privileges at any hospital or health care facility at which Medical Services are to be provided. Procurement of temporary staff privileges pending the completion of medical staff approval process shall satisfy its provision, provided the Physician actively pursues full appointment and actually receives full appointment within a reasonable time.

Section 5.4 *Medical Services.* New PC shall ensure that Physicians and nonphysician health care personnel are available to provide Medical Services to patients. In the event that Physicians employed by, or shareholders of New PC are not available to provide Medical Services coverage, New PC shall engage and retain *locum tenens* coverage. Physicians retained on a *locum tenens* basis shall meet all of the requirements of Section 5.3, and the cost of providing *locum tenens* coverage shall be a New PC Expense. with the assistance of the Business Manager, New PC and the Physicians shall be responsible for scheduling Physician and nonphysician health care personnel coverage of all medical procedures. New PC shall cause all Physicians to develop and promote New PC.

Section 5.5 *Peer Review/Quality Assurance.* New PC shall adopt a peer review/quality assessment program to monitor and evaluate the quality and cost-effectiveness of Medical Services provided by physician personnel of New PC. Upon request of New PC, Business Manager shall provide administrative assistance to New PC in performing its peer

review/quality assurance activities, but only if such assistance can be provided consistent with maintaining the confidentiality and nondiscoverability of the processes and actions of the Peer Review/Quality Assurance process of New PC.

Section 5.6 *New PC's Insurance.* New PC shall, as an Office Expense, obtain and maintain with commercial carriers reasonably acceptable to Business Manager appropriate worker's compensation coverage for New PC's employed personnel, if any, and professional and comprehensive general liability insurance covering New PC and each of the Physicians New PC retains or employs to provide Medical Services. The comprehensive general liability coverage shall be in the minimum amount of Two Million Dollars ($2,000,000); and professional liability coverage shall be in the minimum amount of Two Million Dollars ($2,000,000) for each occurrence and Four Million Dollars ($4,000,000) annual aggregate. The insurance policy or policies shall provide for at least thirty (30) days advance written notice to New PC from the insurer as to any alteration of coverage, cancellation, or proposed cancellation for any cause. New PC shall cause to be issued to Business Manager by such insurer or insurers a certificate reflecting such coverage and shall provide written notice to Business Manager promptly upon receipt of notice given to Physician of the cancellation or proposed cancellation of such insurance for any cause. Upon the termination of this management Services Agreement for any reason, New PC shall obtain and maintain as a New

PC Expense "tail" professional liability coverage, in the amounts specified in this section for an extended reporting period of 10 years, and New PC shall be responsible for paying all premiums for "tail" insurance coverage. In no event shall the professional liability insurance carrier be replaced or changed without New PC Consent.

Section 5.7 *Confidential and Proprietary Information.* New PC will not disclose any Confidential Information of Business Manager without Business Manager's express written authorization, such Confidential Information will not be used in any way directly or indirectly detrimental to Business Manager, and New PC will keep such Confidential Information confidential and will ensure that its affiliates and advisors who have access to such Confidential Information comply with these nondisclosure obligations; provided, however, that New PC may disclose Confidential Information to those of its Representatives who need to know Confidential Information for the purposes of this Management Services Agreement, it being understood and agreed to by New PC that such Representatives will be informed of the confidential nature of the Confidential Information, will agree to be bound by this Section, and will be directed by New PC not to disclose to any other person any Confidential Information. New PC agrees to be responsible for any breach of this Section by its affiliates, advisors, or Representatives. If New PC is requested or required (by oral questions, interrogatories, requests for information or documents,

subpoenas, civil investigative demands, or similar processes) to disclose or produce any Confidential Information furnished in the course of its dealings with Business Manager or its affiliates, advisors, or Representatives, New PC will (i) provide Business Manager with prompt notice thereof and copies, if possible, and, if not, a description, of the Confidential Information requested or required to be produced so that Business Manager may seek an appropriate protective order or waive compliance with the provisions of this Section and (ii) consult with Business Manager as to the advisability of Business Manager's taking of legally available steps to resist or narrow such request. New PC further agrees that, if in the absence of a protective order or the receipt of a waiver hereunder New PC is nonetheless, in the written opinion of its legal counsel, compelled to disclose or produce Confidential Information concerning Business Manager to any tribunal or to stand liable for contempt or suffer other censure or penalty, New PC may disclose or produce such Confidential Information to such tribunal legally authorized to request and entitled to receive such Confidential Information without liability hereunder; provided, however, that New PC shall give Business manager written notice of the Confidential Information to be so disclosed or produced as far in advance of its disclosure or production as is practicable and shall use its best efforts to obtain, to the greatest extent practicable, an order or other reliable assurance that confidential treatment will be accorded to such Confidential Information so required to be disclosed or produced.

Section 5.8 *Noncompetition.* New PC hereby recognizes and acknowledges that Business Manager will incur substantial costs in providing the equipment, support services, personnel, management, administration, and other items and services that are the subject matter of this Management Services Agreement and that in the process of providing services under this Management Services Agreement, New PC will be privy to financial and Confidential Information, to which New PC would not otherwise be exposed. The parties also recognize that the services to be provided by Business Manager will be feasible only if New PC operates an active practice to which the Physicians associated with New PC devote their full professional time and attention. New PC agrees and acknowledges that the noncompetition covenants described hereunder are necessary for the protection of Business Manager, and that Business Manager would not have entered into this Management Services Agreement without the following covenants.

(a) During the Term of this Management Services Agreement and except for its obligations pursuant to this Management Services Agreement, New PC shall not establish, operate, or provide Medical Services at a medical office, clinic or other health care facility anywhere within the Practice Territory.

(b) Except as specifically agreed to by Business Manager in writing, New PC covenants and agrees that during the Term of this Management Services Agreement and for a period of five (5) years from the

date this Management Services Agreement is terminated, New PC shall not directly or indirectly own (excluding ownership of less than five percent (5%) of the equity of any publicly traded entity), manage, operate, control, or be otherwise associated with, lend funds to, lend its name to, or maintain any interest whatsoever in any enterprise (i) having to do with the provision, distribution, promotion, or advertising of any type of management or administrative services or products to third parties in competition with Business Manager, in the Practice Territory; and/or (ii) offering any type of service(s) or product(s) to third parties substantially similar to those offered by Business Manager to New PC in the Practice Territory. Notwithstanding the above restriction, nothing herein shall prohibit New PC or any of its shareholders from providing management and administrative services to its or their own medical practices after the termination of this Management Services Agreement.

(c) The written employment agreements described in Section 5.1 shall contain covenants of the shareholder employees pursuant to which the shareholders agree not to compete with New PC within the Practice Territory for one (1) year after termination of the employment agreement; provided, however, that the individual physician covenants may be modified as described hereafter. Beginning on the fifth anniversary of the effective date of this Management Services Agreement and continuing for thirty (30) days thereafter, New PC may, by a two-thirds vote of the New PC shareholders, modify the covenants of

the shareholder physicians in Article VI of the Physician Employment Agreement. The modifications shall be limited to reductions in the geographic area and/or the purchase price of the covenant. In no event shall the geographic area covered by the covenant be less than five (5) miles from any then-existing New PC site, and in no event shall the purchase price of any covenant be reduced to an amount less than $125,000; and, provided further that the employment agreement may not be modified to reduce the geographic coverage or the purchase price if the shareholder physician will thereafter enter into a contractual relationship with an entity whose primary business is to provide management services to oncology practices.

(d) New PC shall obtain and enforce formal written agreements from its nonshareholder physician employees in the form of Exhibit 5.2(a), pursuant to which the employees agree not to compete with New PC within the Practice Territory for one (1) year, after termination of the employment agreement.

(e) New PC understands and acknowledges that the foregoing provisions in Section 5.7 and Section 5.8 are designed to preserve the goodwill of Business Manager and the goodwill of the individual Physicians of New PC. Accordingly, if New PC breaches any obligation of Section 5.7 or Section 5.8, in addition to any other remedies available under this Management Services Agreement, at law or in equity, Business Manager shall be entitled to enforce this Management Services Agreement by injunctive relief and by

specific performance of the Management Services Agreement, such relief to be without the necessity of posting a bond, cash or otherwise. Additionally, nothing in this paragraph shall limit Business Manager's right to recover any other damages to which it is entitled as result of New PC's breach. If any provision of the covenants is held by a court of competent jurisdiction to be unenforceable due to an excessive time period, geographic area, or restricted activity, the covenant shall be reformed to comply with such time period, geographic area, or restricted activity that would be held enforceable.

Section 5.9 *Name, Trademark.* New PC represents and warrants that New PC conducts its professional practice under the name of, and only under the name of "Oklahoma Oncology & Hematology, P.C." and that such name is the name of New PC under Oklahoma law, and that New PC is the sole and absolute owner of the name. New PC covenants and promises that, without the prior written consent of the Business Manager, New PC will not:

(a) take any action or omit to take any action that is reasonably likely to result in the change or loss of the name;

(b) license, sell, give, or otherwise transfer the name or the right to use the name to any medical practice, physician, professional corporation, or any other entity; or

(c) cease conducting the professional practice of New PC under the name.

New PC covenants and promises that, if New PC becomes a partner in OOA pursuant to Section 1.1 of the Partnership Agreement of OOA, New PC shall cease conducting the professional practice of New PC under the name and shall begin conducting the professional practice of New PC under the name of OOA.

Section 5.10 *Lease Assignment.* Upon Business Manager's request, if New PC is the lessee of the Office under a lease with an unrelated and unaffiliated lessor, New PC shall assign the lease to Business Manager upon receipt of consent from the lessor. New PC shall use its best efforts to assist in obtaining the lessor's consent to the assignment. Upon request, New PC shall execute any instruments and shall take any acts that Business Manager may deem necessary to accomplish the assignment of the lease.

Section 5.11 *Peer Review.* New PC shall designate a committee of Physicians to function as a medical peer review committee to review credentials of potential recruits, perform quality assurance functions, and otherwise resolve medical competence issues. The medical peer review committee shall function pursuant to formal written policies and procedures.

ARTICLE VI. FINANCIAL ARRANGEMENT

Section 6.1 *Definitions.* For purposes of this Article VI, capitalized terms used herein shall have the meanings ascribed as follows:

(a) *Fixed Amount.* The Fixed Amount shall be the amount determined as follows:

Months During Term	Fixed Amount
1-6	$325,890
7-12	331,410
13-18	336,931
19-24	342,451
25-30	347,972
31-36	353,492
37-60	359,013

(b) *Monthly Fee.* The Monthly Fee shall be the sum of the Fixed Amount and seven percent (7%) of Adjusted Gross Revenue.

(c) *Fee Amount.* The Fee Amount shall be the sum of the Monthly Fee and for each prior month in which the Base Management Fee is less than the Monthly Fee, the sum of the amounts of any such shortfall not previously paid.

(d) *Base Management Fee.* The Base Management Fee shall be the lesser of the Fee Amount or the amount of cash available to be paid by New PC.

Section 6.2 *Management Fee.* New PC and Business Manager agree to the compensation set forth herein as being paid to Business Manager in consideration of a substantial commitment made by Business Manager hereunder and that such fees are fair and reasonable. Each month, in the priority established by Section 4.9(b), Business Manager shall be paid the following:

(i) the amount of all Office Expenses (other than the Base Management Fee) paid on behalf of New PC.

(ii) the Base Management Fee.

(iii) the Performance Fee if the pre-established criteria for payment of the Performance Fee set forth in the Budget have been met.

Section 6.3 *Adjustments*. Adjustments to the Management Fee calculation shall be made as follows:

(a) Upon termination of this Management Services Agreement, a liability for the Management Fee shall be established in an amount equal to the difference, if any between (i) the cumulative Monthly Fees during the Term less (ii) the amounts already paid by New PC as Base Management Fees, and the Base Management Fee and any cumulated but unpaid Performance Fees shall become immediately due and payable.

(b) Beginning on the fifth anniversary of this Management Services Agreement and continuing through the termination of this Management Services Agreement, the Monthly Fee shall be twenty-four and seven-tenths percent (24.7%) of Adjusted Gross Revenue.

(c) If there are not sufficient funds to pay the Performance Fee, unpaid amounts shall accumulate and carry over from month to month until paid. No amounts carried over shall earn interest. Furthermore,

the amount of the Performance Fee paid will be monitored and reconciled on an annual basis and any overpayments of the Performance Fee shall be promptly refunded by the Business Manager.

Section 6.4 *Reasonable Value.* Payment of the Base Management Fee or Performance Fee is not intended to be and shall not be interpreted or applied as permitting Business Manager to share in New PC's fees for Medical Services or any other services, but is acknowledged as the parties' negotiated agreement as to the reasonable fair market value of the equipment, contract analysis and support, other support services, purchasing, personnel, office space, management, administration, strategic management and other items and services furnished by Business Manager pursuant to this Management Services Agreement, considering the nature and volume of the services required and the risks assumed by Business Manager.

Section 6.5 *Payment of Management Fee.* To facilitate the payment of the Management Fee as provided in Section 6.1 hereof, New PC hereby expressly authorizes Business Manager to make withdrawals of the Management Fee from the New PC Account as such fee becomes due and payable during the Term and thereafter as provided in Section 7.3.

Section 6.6 *Accounts Receivable.* To assure that New PC receives the entire amount of professional fees for its services and to assist New PC in maintaining reasonable cash flow for the payment of Office

Expenses, Business Manager may, during the Term, purchase, with recourse to New PC for the amount of the purchase, the accounts receivable of New PC arising during the previous month by transferring the amount set forth below into the New PC Account. The consideration for the purchase shall be an amount equal to the Adjusted Gross Revenue recorded each month (according to GAAP on an accrual basis net of Adjustments). Business Manager shall be entitled to offset Office Expenses reimbursement due to Business Manager under Section 6.2 above against the amount payable for the accounts receivable. Although it is the intention of the parties that Business Manager purchase and thereby become the owner of the accounts receivable of New PC, in the event such purchase shall be ineffective for any reason, New PC is concurrently herewith granting to Business Manager a security interest in the accounts receivable, and New PC shall cooperate with Business Manager and execute all documents in connection with the pledge of such accounts receivable to Business Manager. All collections in respect to such accounts receivable purchased by Business Manager shall be received by Business Manager as the agent of New PC and shall be endorsed to Business Manager and deposited in a bank account at a bank designated by Business Manager. To the extent New PC comes into possession of any payments in respect of such accounts receivable, New PC shall direct such payments to Business Manager for deposit in bank accounts designated by Business Manager.

Section 6.7 *Disputes Regarding Fees.*

(a) It is the parties' intent that any disputes regarding performance standards of the Business Manager be resolved to the extent possible by good faith negotiation. To that end, the parties agree that if New PC in good faith believes that Business Manager has failed to perform its obligations, and that as a result of such failure, New PC is entitled to a set-off or reduction in its Management Fees, New PC shall give Business Manager notice of the perceived failure and request in the notice a set-off or reduction in Management Fees. Business Manager and New PC shall then negotiate the dispute in good faith, and if an agreement is reached, the parties shall implement the resolution without further action.

(b) If the parties cannot reach a resolution within a reasonable time, New PC shall, at its option, submit the dispute to mediation. Mediation shall be conducted in Tulsa, Oklahoma in accordance with the rules of the National Health Lawyers Association Alternative Dispute Resolution Service, and if the amount in dispute is $50,000 or less, the mediation shall be binding.

(c) If the amount in dispute is greater than $50,000, or if the mediation process fails to resolve the dispute, the dispute shall be submitted by either party to binding arbitration as described by Article XI of the Purchase Agreement (as defined by the Master Transaction Agreement).

ARTICLE VII. TERM AND TERMINATION

Section 7.1 *Initial and Renewal Term*. The Term of this Management Services Agreement will be for an initial period of forty (40) years after the effective date, and shall be automatically renewed for successive five (5) year periods thereafter, provided that neither Business Manager nor New PC shall have given notice of termination of this Management Services Agreement at least one hundred twenty (120) days before the end of the initial term or any renewal term, or unless otherwise terminated as provided in Section 7.2 of this Management Services Agreement.

Section 7.2 *Termination*.

(a) *Termination By Business Manager*. Business Manager may terminate this Management Services Agreement upon the occurrence of any one of the following events which shall be deemed to be "for cause":

(i) New PC's loss or suspension of its Medicare or Medicaid provider number, and/or New PC's restriction from treating beneficiaries of the Medicare or Medicaid programs, except as effected with connection with the formation and operation of OOA;

(ii) The dissolution of New PC or the filing of a petition in voluntary bankruptcy, an assignment for the benefit of creditors, or other action taken voluntarily or involuntarily

under any State or federal statute for the protection of debtors;

(iii) New PC materially defaults in the performance of any of its material duties or obligations hereunder, and such default continues for sixty (60) days after New PC receives notice of the default.

(b) *Termination By New PC.* New PC may terminate this Management Services Agreement upon any of the following occurrences which shall be deemed to be "for cause":

(i) With thirty (30) days notice in the event that Business Manager materially defaults in the performance of any of its material obligations hereunder and such default continues for sixty (60) days after Business Manager receives notice of the default;

(ii) In the event that an arbitrator pursuant to Section 8.6 makes a final determination that Business Manager has materially breached a fiduciary duty owed to New PC, New PC may terminate this Management Services Agreement upon ten (10) days written notice to Business Manager;

(iii) In the event Business Manager intentionally and in bad faith misappropriates or misapplies New PC's funds and fails to correct such misappropriation or inappropriate application within thirty (30) days of receipt of written notice from New PC describing with particularity the misappropriation or misapplication, New PC may terminate this

Management Services Agreement upon ten (10) days written notice to Business Manager;

(iv) If AOR defaults in its payment obligations under the Note (as defined in the Master Transaction Agreement) and if such default continues for ten (10) days after notice has been given to AOR, New PC may terminate this Management Services Agreement not less than thirty (30) days after Business Manager's receipt of such notice.

Termination by New PC hereunder shall require the affirmative vote of three-fourths of the outstanding voting shares of the common shareholders of New PC entitled to vote; provided, however, that if the option (the "Option"), which is contained in the Option Agreement of even date herewith between the shareholders in New PC and Lloyd K. Everson, M.D. (the "Optionee," which term shall also includes [sic] any successors), has been exercised, termination by New PC hereunder shall require the affirmative vote of two-thirds (2/3) of the shareholders in New PC, other than the Optionee (if there are shareholders other than Optionee) who are entitled to vote; and if there are no shareholders other than Optionee, termination may be effected by the affirmative vote of 2/3 of the Physician employees of New PC whose New PC stock was purchased by Optionee.

(c) *Termination by Agreement.* In the event New PC and Business Manager shall mutually agree in writing, this Management Services Agreement may

be terminated on the date specified in such written agreement.

(d) *Legislative, Regulatory or Administrative Change.* In the event there shall be a change in the Medicare or Medicaid statutes, State statutes, case laws, regulations or general instructions, the interpretation of any of the foregoing, the adoption of new federal or State legislation, or a change in any third party reimbursement system, any of which are reasonably likely to materially and adversely affect the manner in which either party may perform or be compensated for its services under this Management Services Agreement or which shall make this Management Services Agreement unlawful, the parties shall immediately enter into good faith negotiations regarding a new service arrangement or basis for compensation for the services furnished pursuant to this Management Services Agreement that complies with the law, regulation, or policy and that approximates as closely as possible the economic position of the parties prior to the change. If good faith negotiations cannot resolve the matter, it shall be submitted to arbitration as referenced in Section 8.6.

Section 7.3 *Effects of Termination.* Upon termination of this Management Services Agreement, as hereinabove provided, neither party shall have any further obligations hereunder except for (i) obligations accruing prior to the date of termination, including, without limitation, payment of the Management Fees and New PC Expenses relating to services provided prior to the termination of this Management

Services Agreement, (ii) obligations, promises, or covenants set forth herein that are expressly made to extend beyond the Term, including, without limitation, indemnities and noncompetition provisions, which provisions shall survive the expiration or termination of this Management Services Agreement by Business Manager for cause or by New PC without cause, and (iii) the obligations of New PC and Business Manager described in Section 7.4. in effectuating the provisions of this Section 7.3, New PC specifically acknowledges and agrees that Business Manager shall continue to collect and receive on behalf of New PC all cash collections from accounts receivable in existence at the time this Management Services Agreement is terminated, it being understood that such cash collections will represent, in part, compensation to Business Manager for management services already rendered and compensation on accounts receivable purchased by Business Manager. Upon the expiration or termination of this Management Services Agreement for any reason or cause whatsoever, Business Manager shall surrender to New PC all books and records pertaining to New PC's medical practice.

Section 7.4 *Repurchase Obligation.* Upon termination of this Management Services Agreement by Business Manager for cause or by New PC without cause, New PC shall:

(a) Purchase from Business Manager at book value the intangible assets, deferred charges, and all other amounts on the books of the Business Manager

relating to the Management Services Agreement as adjusted through the last day of the month most recently ended prior to the date of such termination in accordance with GAAP to reflect amortization or depreciation of the intangible assets, deferred charges, or covenants;

(b) Purchase from Business Manager any real estate owned by Business Manager and used as an Office at the greater of the appraised fair market value thereof or the then book value thereof. In the event of any repurchase of real property, the appraised value shall be determined by Business Manager and New PC, each selecting a duly qualified appraiser, who in turn will agree on a third appraiser. This agreed-upon appraiser shall perform the appraisal which shall be binding on both parties. In the event either party fails to select an appraiser within fifteen (15) days of the selection of an appraiser by the other party, the appraiser selected by the other party shall make the selection of the third party appraiser,

(c) Purchase at book value all improvements, additions, or leasehold improvements that have been made by Business Manager at any Office and that relate solely to the performance of Business Manager's obligations under this Management Services Agreement;

(d) Assume all debt, and all contracts, payables, and leases that are obligations of Business Manager and that relate principally to the performance of

Business Manager's obligations under this Management Services Agreement or the properties leased or sublease hereunder by Business Manager; and

(e) Purchase from Business Manager at book value all of the equipment listed as set forth in the Master Transaction Agreement or an exhibit thereto, including all replacements and additions thereto made by Business Manager pursuant to the performance of its obligations under this Management Services Agreement, and all other assets, including inventory and supplies, tangibles and intangibles, set forth on the books of the Business Manager as adjusted through the last day of the month most recently ended prior to the date of such termination in accordance with GAAP to reflect operations of the Office, depreciation, amortization, and other adjustments of assets shown on the books of the Business Manager.

New PC acknowledges that certain assets listed above have been pledged as collateral pursuant to that certain Loan Agreement dated December 5, 1994 between AOR, as borrower, and First Union National Bank of North Carolina, as agent for various lenders.

Section 7.5 *Repurchase Option*. Upon termination of this Management Services Agreement by New PC for cause, New PC shall have the option but not the obligation to do all or none of the following:

(a) Purchase from Business Manager any real estate owned by Business Manager and used as an Office at the greater of the appraised fair market

value thereof or the then book value thereof. In the event of any repurchase of real property, the appraised value shall be determined by Business Manager and New PC, each selecting a duly qualified appraiser, who in turn will agree on a third appraiser. This agreed-upon appraiser shall perform the appraisal which shall be binding on both parties. In the event either party fails to select an appraiser within fifteen (15) days of the selection of an appraiser by the other party, the appraiser selected by the other party shall make the selection of the third party appraiser;

(b) Purchase at book value all improvements, additions, or leasehold improvements that have been made by Business Manager at any Office and that relate solely to the performance of Business Manager's obligations under this Management Services Agreement;

(c) Assume all debt, and all contracts, payables, and learns that are obligations of Business Manager and that relate principally to the performance of Business Manager's obligations under this Management Services Agreement or the properties leased or subleased by Business Manager; and

(d) Purchase from Business Manager at book value all of the equipment listed as set forth in the Master Transaction Agreement or an exhibit thereto, including all replacements and additions thereto made by Business Manager pursuant to the performance of its obligations under this Management Services

Agreement, and all other tangible assets, including inventory and supplies, set forth on the books of the Business Manager as adjusted through the last day of the month most recently ended prior to the date of such termination in accordance with GAAP to reflect operations of the Office, depreciation, amortization, and other adjustments of assets shown on the books of the Business Manager.

New PC acknowledges that certain assets listed above have been pledged as collateral pursuant to that certain loan Agreement dated December 5, 1994 between AOR, as borrower, and First Union National Bank of North Carolina, as agent for various lenders.

Section 7.6 *Closing of Repurchase.* New PC shall pay cash for the repurchased assets. The amount of the purchase price shall be reduced by the amount of debt and liabilities of Business Manager, if any, assumed by New PC. New PC and any Physician associated with New PC shall execute such documents as may be required to assume the liabilities set forth in Section 7.4(d) or Section 7.5(c) and to remove Business Manager from any liability with respect to such repurchased asset and with respect to any property leased or subleased by Business Manager. The closing date for the repurchase shall be determined by Business Manager but shall in no event occur later than one hundred eighty (180) days from the date of the notice of termination. The termination of this Management Services Agreement shall become effective upon the closing of the sale of the assts under Section 7.4 or the delivery of assets (or the date

upon which New PC is prepared to receive the assets) under Section 7.5 and all parties shall be released from any restrictive covenants provided for in Section 4.16 or Section 5.8 on the closing date. From and after any termination, each party shall provide the other party with reasonable access of the books and records then owned by it to permit such requesting party to satisfy reporting and contractual obligations that may be required of it.

ARTICLE VIII. MISCELLANEOUS

Section 8.1 *Administrative Services Only.* Nothing in this Management Services Agreement is intended or shall be construed to allow Business Manager to exercise control or direction over the manner or method by which New PC and its Physicians perform Medical Services or other professional health care services. The rendition of all Medical Services, including, but not limited to, infusion therapy and the prescription or administration of medicine and drugs shall be the sole responsibility of New PC and its Physicians, and Business Manager shall not interfere in any manner or to any extent therewith. Nothing contained in this Management Services Agreement shall be construed to permit Business Manager to engage in the practice of medicine, it being the sole intention of the parties hereto that the services to be rendered to New PC by Business Manager are solely for the purpose of providing nonmedical management and administrative services to New PC so as to enable New PC to devote its full

time and energies to the professional conduct of its medical practice and provision of Medical Services to its patients and not to administration, or practice management.

Section 8.2 *Status of Contractor*. It is expressly acknowledged that the parties hereto are "independent contactors," and nothing in this Management Service Agreement is intended and nothing shall be construed to create an employer/employee, partnership, or joint venture relationship, or to allow either to exercise control or direction over the manner or method by which the other performs the services that are the subject matter of this Management Services Agreement; provided always that the services to be provided hereunder shall be furnished in a manner consistent with the standards governing such services and the provisions of this Management Services Agreement. Each party understands and agrees that (i) the other will not be treated as an employee for federal tax purposes, (ii) neither will withhold on behalf of the other any sums for income tax, unemployment insurance, social security, or any other withholding pursuant to any law or requirement of any governmental body or make available any of the benefits afforded to its employees, (iii) all of such payments, withholdings, and benefits, if any, are the sole responsibility of the party incurring the liability, and (iv) each will indemnify and hold the other harmless from any and all loss or liability arising with respect to such payments, withholdings, and benefits, if any.

Section 8.3 *Notices*. Any notice, demand, or communication required, permitted, or desired to be given hereunder shall be in writing and shall be served on the parties at the following respective addresses:

New PC: Oklahoma Oncology & Hematology, P.C.
6151 South Yale Avenue
Suite 100
Tulsa, Oklahoma 74136

with a copy to: Katten, Muchin & Zavis
525 West Monroe Street
Chicago, Illinois 60661-2174
Attention: Steven Napolitano

and

Anderson, McCoy & Orta, P.C.
1580 Liberty Tower
Oklahoma City, Oklahoma 73102
Attention: J. Michael McCoy

Business Manager: Oncology & Hematology Management Partnership
6151 South Yale Avenue,
Suite 100
Tulsa, Oklahoma 74136-1902
Attention: Alan M. Keller, M.D.

with a copy to: American Oncology Resources, Inc.
17001 Northchase Dr., Suite 330
Houston, Texas 77060
Attention: Dale Ross

or to such other address, or to the attention of such other person or officer, as any party may by written notice designate. Any notice, demand, or communication required, permitted, or desired to be given hereunder shall be sent either (a) by hand delivery, in which case notice shall be deemed received when actually delivered, (b) by prepaid certified or registered mail, return receipt requested, in which case notice shall be deemed received five calendar days after deposit, postage prepaid in the United States Mail, or (c) by a nationally recognized overnight courier, in which case notice shall be deemed received one business day after deposit with such courier.

Section 8.4 *Governing Law*. This Management Services Agreement shall be governed by the laws of the State of Texas applicable to agreements to be performed wholly within the State. Texas law was chosen by the parties after negotiation to govern interpretation of this Management Services Agreement because Harris County, Texas is the seat of management for Business Manager. The federal and State courts of Tulsa County, Oklahoma shall be the exclusive venue for any litigation, special proceeding, or other proceeding between the parties that may arise out of, or be brought in connection with or by reason of, this Management Services Agreement.

Section 8.5 *Assignment*. Except as may be herein specifically provided to the contrary, this Management Services Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective legal representatives, successors, and

assigns; provided, however, that New PC may not assign this Management Services Agreement without the prior written consent of Business Manager, which consent may be withheld. The sale, transfer, pledge, or assignment of any of the common shares held by any shareholder of New PC or the issuance by New PC of common or other voting shares to any other person, or any combination of such transactions within a period of one (1) year, such that the existing shareholders in New PC fail to maintain a majority of the voting interests in New PC shall be deemed an attempted assignment by New PC, and shall be null and void unless consented to in writing by Business Manager prior to any such transfer or issuance. Any breach of this provision, whether or not void or voidable, shall constitute a material breach of this Management Services Agreement, and in the event of such breach, Business Manager may terminate this Management Services Agreement upon twenty-four (24) hours notice to New PC. The parties agree that American Oncology Resources, Inc. ("AOR") shall succeed to all of Business Manager's rights and obligations under this Management Services Agreement and shall then assign and deliver all of its rights and obligations hereunder to its wholly-owned subsidiary, AOR Management Company of Oklahoma, Inc. ("AOR Management"). AOR Management shall then become the Business Manager under this Management Services Agreement. In addition, Business Manager or the transferee shall have the right to (i) assign its rights and obligations hereunder to any third party and (ii) collaterally assign its interest in

this Management Services Agreement and its right to collect Management Fees hereunder to any financial institution or other third party without the consent of New PC. New PC acknowledges that Business Manager's interest in this Management Services Agreement and Business Manager's right to collect Management Fees under this Management Services Agreement have been collaterally assigned pursuant to that certain Loan Agreement dated December 5, 1994 between AOR, as borrower, and First Union National Bank of North Carolina, as agent for various lenders.

Section 8.6 *Arbitration*. The parties shall use good faith negotiation to resolve any controversy, dispute or disagreement arising out of or relating to this Management Services Agreement or the breach of this Management Services Agreement. Any matter not resolved by negotiation shall be submitted to binding arbitration and such arbitration shall be governed by the terms of Article XI of the Purchase Agreement, which, as it applies to the parties hereto, is incorporated herein by reference in its entirety.

Section 8.7 *Waiver of Breach*. The waiver by either party of a breach or violation of any provision of this Management Services Agreement shall not operate as, or be construed to constitute, a waiver of any subsequent breach of the same or another provision hereof.

Section 8.8 *Enforcement*. In the event either party resorts to legal action to enforce or interpret

any provision of this Management Services Agreement, the prevailing party shall be entitled to recover the costs and expenses of such action so incurred, including, without limitation, reasonable attorneys' fees.

Section 8.9 *Gender and Number.* Whenever the context of this Management Services Agreement requires, the gender of all words herein shall include the masculine, feminine, and neuter, and the number of all words herein shall include the singular and plural.

Section 8.10 *Additional Assurances.* Except as may be herein specifically provided to the contrary, the provisions of this Management Services Agreement shall be self-operative and shall not require further agreement by the parties; provided, however, at the request of either party, the other party shall execute such additional instruments and take such additional acts as are reasonable and as the requesting party may deem necessary to effectuate this Management Services Agreement.

Section 8.11 *Consents, Approvals, and Exercise of Discretion.* Whenever this Management Services Agreement requires any consent or approval to be given by either party, or either party must or may exercise discretion, and except where specifically set forth to the contrary, the parties agree that such consent or approval shall not be unreasonably withheld or delayed, and that such discretion shall be reasonably exercised.

Section 8.12 *Force Majeure*. Neither party shall be liable or deemed to be in default for any delay or failure in performance under this Management Services Agreement or other interruption of service deemed to result, directly or indirectly, from acts of God, civil or military authority, acts of public enemy, war, accidents, fires, explosions, earthquakes, floods, failure of transportation, strikes or other work interruptions by either party's employees, or any other similar cause beyond the reasonable control of either party unless such delay or failure in performance is expressly addressed elsewhere in this Management Services Agreement.

Section 8.13 *Severability*. The parties hereto have negotiated and prepared the terms of this Management Services Agreement in good faith with the intent that each and every one of the terms, covenants and conditions herein be binding upon and inure to the benefit of the respective parties. Accordingly, if any one or more of the terms, provisions, promises, covenants or conditions of this Management Services Agreement or the application thereof to any person or circumstance shall be adjudged to any extent invalid, unenforceable, void or voidable for any reason whatsoever by a court of competent jurisdiction or an arbitration tribunal, such provision shall be as narrowly construed as possible, and each and all of the remaining terms, provisions, promises, covenants and conditions of this Management Services Agreement or their application to other persons or circumstances shall not be affected thereby and shall be valid and enforceable

to the fullest extent permitted by law. To the extent this Management Services Agreement is in violation of applicable law, then the parties agree to negotiate in good faith to amend the Management Services Agreement, to the extent possible consistent with its purposes, to conform to law.

Section 8.14 *Divisions and Headings.* The divisions of this Management Services Agreement into articles, sections, and subsections and the use of captions and headings in connection therewith is solely for convenience and shall not affect in any way the meaning or interpretation of this Management Services Agreement.

Section 8.15 *Amendments and Management Services Agreement Execution.* This Management Services Agreement and amendments hereto shall be in writing and executed in multiple copies on behalf of New PC by its President, and on behalf of Business Manager by all of its partners. Each multiple copy shall be deemed an original, but all multiple copies together shall constitute one and the same instrument.

Section 8.16 *Entire Management Services Agreement.* With respect to the subject matter of this Management Services Agreement, this Management Services Agreement supersedes all previous contracts and constitutes the entire agreement between the parties. Neither party shall be entitled to benefits other than those specified herein. No prior oral statements or contemporaneous negotiations or understandings or prior written material not specifically incorporated

herein shall be of any force and effect, and no changes in or additions to this Management Services Agreement shall be recognized unless incorporated herein by amendment as provided herein, such amendment(s) to become effective on the date stipulated in such amendment(s). The parties specifically acknowledge that, in entering into and executing this Management Services Agreement, the parties rely solely upon the representations and agreements contained in this Management Services Agreement and no others.

IN WITNESS WHEREOF, New PC and Business Manager have caused this Management Services Agreement to be executed by their duly authorized representatives, all as of the day and year first above written.

NEW PC: OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C.
an Oklahoma professional corporation

By: /s/ Alan M. Keller
Alan M. Keller, M.D.
President

BUSINESS MANAGER: ONCOLOGY AND HEMATOLOGY MANAGEMENT PARTNERSHIP,
a Texas general partnership

By: /s/ Alan M. Keller
Alan M. Keller, M.D.
Managing Partner

EXHIBIT B

Card # 1 of 2

☒ NEW Change in Signers: check only one box
- ☐ ADD
- or
- ☐ REPLACEMENT (Supersedes All Others)

Check all applicable boxes:
- ☐ Special Instructions
- ☐ Multiple Accounts
- ☑ Manual Signature
- ☐ Facsimile Signature

"Bank" refers to:
JP MORGAN CHASE BANK

COMMERCIAL & FIDUCIARY SIGNATURE CARD

ACCOUNT NAME (ONLY "DEPOSITOR") **OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. DBA CANCER CARE ASSOCIATES**			
ACCOUNT NUMBER **00113253216**	DATE OPENED (if new)	REVISED DATE (if Other Than New)	TAX ID NUMBER ~~431469927~~ 731469927 [/s/ BM]

TIN CERTIFICATION

The Internal Revenue Service does not require your consent to any provision of this document other than the certifications required to avoid backup withholding.

By signing below, Depositor and each of the signers certifies under penalties of perjury that:

(1) The number shown on this form is Depositor's correct taxpayer identification number; and

(2) Depositor is not subject to backup withholding because (a) Depositor is exempt from backup withholding [Depositor must check appropriate box below], or (b) Depositor has not been notified by the Internal Revenue Service (IRS) that Depositor is subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified Depositor that Depositor is no longer subject to backup withholding; and

(3) Depositor is a U.S. person (including a U.S. resident alien).

☐ Check here if Depositor is Exempt from backup withholding.

☐ Check here if Depositor is subject to backup withholding for failure to report interest or dividends.

☐ Check here if Depositor is not a U.S. person (nor a U.S. resident alien), and complete the appropriate From W-8.

SIGNATURES USE *BLACK* INK NO. OF SIGS REQ'D 1	TYPED OR PRINTED NAME(S)
1. /s/ Bruce Broussard	1. **BRUCE BROUSSARD**
2. /s/ Thomas J. Sullivan, Jr.	2. **THOMAS J. SULLIVAN JR.**
3. /s/ Susan Carmack	3. **SUSAN CARMACK**
4. /s/ Lance Carlson	4. **LANCE CARLSON**
5. /s/ Glenn Noble	5. **GLENN NOBLE**

Depositor acknowledges receipt of and agrees to the provisions of Bank's Terms and Conditions of Deposit Accounts for Business Entities, schedule of service charges, and Funds Availability Policy.

☐ SPECIAL INSTRUCTIONS, IF ANY (Must Agree with Certificate Regarding Account(s) or Non-Standard Resolution):

MAILING ADDRESS	BAC	SERVICING OFFICER #
16825 NORTHCHASE DRIVE, SUITE 1300 HOUSTON, TX 77060	**6095**	**0003**

STREET ADDRESS, IF DIFFERENT FROM ABOVE	PHONE #	AMOUNT OF DEPOSIT	SOURCE OF FUNDS
	8326016379		

FIRST DEPOSITOR ID	CHEX SYSTEM/ TELECHECK	BANK REFERENCE
SECOND DEPOSITOR ID	CHEX SYSTEM/ TELECHECK	
THIRD DEPOSITOR ID	CHEX SYSTEM/ TELECHECK	

SALESPERSON	PHONE #	ECA #	BRANCH NO.	DATE
J. CASHIOLA	**(713) 216-0404**	**021224**		**SEPTEMBER 25, 2002**

APPROVED BY
/s/ J. Cashiola **D.E.**

Card # 2 of 2

☒ NEW

Change in Signers: check only one box

☐ ADD

or

☐ REPLACEMENT (Supersedes All Others)

Check all applicable boxes:

☐ Special Instructions
☐ Multiple Accounts
☑ Manual Signature
☐ Facsimile Signature

"Bank" refers to:
JP MORGAN CHASE BANK

COMMERCIAL & FIDUCIARY SIGNATURE CARD

ACCOUNT NAME (ONLY "DEPOSITOR") **OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. DBA CANCER CARE ASSOCIATES**			
ACCOUNT NUMBER **00113253216**	DATE OPENED (if new)	REVISED DATE (if Other Than New)	TAX ID NUMBER **731469927**

TIN CERTIFICATION

The Internal Revenue Service does not require your consent to any provision of this document other than the certifications required to avoid backup withholding.

By signing below, Depositor and each of the signers certifies under penalties of perjury that:

(1) The number shown on this form is Depositor's correct taxpayer identification number; and

(2) Depositor is not subject to backup withholding because (a) Depositor is exempt from backup withholding [Depositor must check appropriate box below], or (b) Depositor has not been notified by the Internal Revenue Service (IRS) that Depositor is subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified Depositor that Depositor is no longer subject to backup withholding; and

(3) Depositor is a U.S. person (including a U.S. resident alien).

☐ Check here if Depositor is Exempt from backup withholding.

☐ Check here if Depositor is subject to backup withholding for failure to report interest or dividends.

☐ Check here if Depositor is not a U.S. person (nor a U.S. resident alien), and complete the appropriate From W-8.

SIGNATURES USE *BLACK* INK NO. OF SIGS REQ'D [1]	TYPED OR PRINTED NAME(S)
6. /s/ James A. Young	6. **JAMES YOUNG, M.D.**
7.	7.
8.	8.
9.	9.
10.	10.

Depositor acknowledges receipt of and agrees to the provisions of Bank's Terms and Conditions of Deposit Accounts for Business Entities, schedule of service charges, and Funds Availability Policy.

☐ SPECIAL INSTRUCTIONS, IF ANY (Must Agree with Certificate Regarding Account(s) or Non-Standard Resolution):

MAILING ADDRESS	BAC	SERVICING OFFICER #
16825 NORTHCHASE DRIVE, SUITE 1300 HOUSTON, TX 77060	**6095**	**0003**

STREET ADDRESS, IF DIFFERENT FROM ABOVE	PHONE #	AMOUNT OF DEPOSIT	SOURCE OF FUNDS
	8326016379		

FIRST DEPOSITOR ID	CHEX SYSTEM/ TELECHECK	BANK REFERENCE
SECOND DEPOSITOR ID	CHEX SYSTEM/ TELECHECK	
THIRD DEPOSITOR ID	CHEX SYSTEM/ TELECHECK	

SALESPERSON	PHONE #	ECA #	BRANCH NO.	DATE
J. CASHIOLA	**(713) 216-0404**	**021224**		**SEPTEMBER 25, 2002**

APPROVED BY
/s/ J. Cashiola **D.E.**

EXHIBIT D

CORPORATE SECRETARY'S CERTIFICATE REGARDING ACCOUNT(S)

CUSTOMER NAME: OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. DBA CANCER CARE ASSOCIATES

This Corporate Secretary's Certificate Regarding Account(s) is provided to JPMorgan Chase Bank (the "Bank") with respect to the following "Account(s)":

ACCOUNT NUMBER: 00113253216

ACCOUNT STYLING
OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. DBA CANCER CARE ASSOCIATES

1. Certification.

The undersigned, as _____ of the Customer, certifies that resolutions authorizing the agreements and other matters contained in this certificate have been duly adopted by the Board of directors of the customer, as required by the charter and bylaws of the Customer, are recorded in the minute books of the Customer, and have not been rescinded, modified or amended.

2. The Bank of Depository.

The Bank has been selected as a depository for the funds of the Customer. The Bank may obtain information from any sources, including credit investigations, as it deems appropriate. Opening any Account will constitute the Customer's agreement to the Bank's Terms and Conditions of Deposit Accounts (as

they may be amended from time to time) and to each of the agreements reflected in this certificate.

3. Authorized Persons

The Bank may allow funds to be withdrawn from any Account on the check, draft, or other order of payment bearing the Account number(s) (and any indebtedness thereby created will be the indebtedness of the customer) when signed by 1 of the following persons ("Authorized Persons")

Notwithstanding the above, any Authorized Person is authorized singly to: (1) initiate Automated Clearing House ("ACH") debits without a signature; (2) initiate payments by use of Depository Transfer Checks ("DTC") without a signature other than the name of the Customer printed on the DTC; or (3) give instructions, by means other than the signing of an item, with respect to any account transaction, including, but not limited to, the payment, transfer or withdrawal of funds by wire, computer or other electronic means, or otherwise, or of money, credits, items or property at any time held by the Bank for account of the Customer ("Instructions").

NAME	MANUAL/FACSIMILE
BRUCE BROUSSARD	Manual Only
BRENDA LANZEL	Manual Only
SUSAN CARMACK	Manual Only

SPECIAL INSTRUCTIONS

Manual
NONE

Facsimile
NONE

4. Facsimile Signatures.

The Bank may honor checks, drafts or other orders for payment bearing or purporting to bear the facsimile signature of any of the Authorized Persons whose name above is followed by the words "Facsimile Only" or "Both" under the Manual/Facsimile column, regardless of by whom or by what means the actual or purported facsimile signature may have been affixed, if the signature resembles the facsimile specimen on file with the Bank (if the Authorized Person is to have only facsimile signing authority, with no manual signature authority. "Facsimile Only" will be denoted in the Manual/Facsimile column).

To induce the Bank to accept items bearing facsimile signatures, the Customer agrees that there is no commercially reasonable method by which the Bank can determine the authenticity or authority of facsimile signatures, and the Customer assumes all risk of forged or unauthorized items bearing such a facsimile signature and agrees that the Bank will not be liable for payment of such items.

5. Changes in Authorized Persons.

_____ may instruct the Bank to add or delete signatories to an Account by a written notice to the Bank (a "Change Certificate"), certifying the signature of each additional signatory and setting forth any limitations on the authority of signatories. Upon receipt of a Change Certificate the Bank may (a) make conforming additions and deletions to any signature card on file with the Bank (whether the signature card was provided to the Bank prior to or after the date of this certificate, and (b) treat any of the persons then authorized on an Account as Authorized Persons under this certificate for all purposes.

6. Authority on Accounts.

Each Authorized Person, acting alone, may (a) endorse checks and drafts for deposit or encashment and demand and receive the proceeds thereof, (b) sign for and receive the Account statements and appoint agents to sign for and receive those documents, (c) stop payment against checks of the customer, (d) give instructions to the Bank regarding the Accounts (except instructions relating to adding and deleting authorized signers if more than one signature is required on a Change Certificate), and (e) otherwise bind the Customer by signing any agreement with the Bank affecting any Account.

7. Oral instructions.

The Bank, at its option, may honor any telephonic or other oral instructions from any Authorized Person concerning any Account, including instructions regarding wire transfers and intrabank transfers to and from any Account, without requiring a signature of an Authorized Person (unless the Bank has agreed to restrictions on such transfers in a separate agreement with the Customer). The Bank has no duty to inquire about the circumstances of such instructions, even if the instructions involve a transfer to the individual order of, or in payment of any individual obligation of any Authorized Person, any of the undersigned, or any other officer, agent, employee or representative of the Customer, Trustee, or otherwise.

8. Conflicting Instructions.

If at any time, any two or more Authorized Persons or other persons purporting to be authorized to act on behalf of the Customer give the Bank conflicting instructions regarding the authority of other persons named in this certificate, the Bank may (a) honor one ore more of such instructions which are consistent with this certificate, (b) refuse to honor any such instructions until the Bank receives jointly agreed instructions from all persons who had issued conflicting instructions, or (c) interplead the funds in the Account(s) subject to conflicting instructions. The Bank will not be liable to the customer or any other persons for following any of these options.

9. Continued Effectiveness.

This certificate will continue in full force and effect until the Bank actually receives written notice from the Customer revoking or modifying this certificate, and the Bank may conclusively presume that this certificate is in effect and that the persons identified from time to time as officers of the Customer by certificate of the Secretary or Assistant Secretary have been duly elected or appointed and continue to hold such offices.

Executed this 21st day of May, 2004.

CUSTOMER NAME: OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C. DBA CANCER CARE ASSOCIATES

Signature of Secretary or Assistant Secretary:
(If another officer signs, attach a copy of the bylaws evidencing authority.)

Signature: /s/ George D. Morgan

Typed/Printed Name: George D. Morgan

Title: Chief Operating Officer

FOR BANK USE ONLY:

Prepared by:	JOANNA M. CASHIOLA	ECA:	021224	Phone:	(713) 216-0404
Mail Station:	08-CBBS-302	Cost Center:	89732	Date Printed:	May 17, 2004

CORPORATE RESOLUTION of OKLAHOMA ONCOLOGY HEMATOLOGY, P.C., d/b/a CANCER CARE ASSOCIATES GRANTING and REVOKING AUTHORITY

The Board of Directors of Oklahoma Oncology & Hematology, P.C., d/b/a Cancer Care Associates, an Oklahoma Professional Corporation [hereafter CCA], hereby adopts the following resolutions and directs that a copy hereof be immediately and forthwith delivered to JPMorgan Chase Bank, N.A., as follows:

WHEREAS CCA is the owner of account # 113253216 maintained at JPMorganChase Bank, N.A., in CCA's name and under its tax ID # (73-1469927) which is also its Medicare provider number; and

WHEREAS on January 18, 2006, CCA delivered to JPMorgan Chase Bank, N.A., a resolution of this Board adopted December 13, 2005, directing JPMorganChase Bank, N.A., immediately release and disclose to Lana Tyree, Attorney for CCA, any and all information she may request regarding any and all accounts held and maintained in the name and tax ID number of Oklahoma Oncology & Hematology, P.C., d/b/a Cancer Care Associates, maintained at any Chase bank, and specifically including:

CCA's account # 113253216, owned and maintained by CCA in its name and under its tax ID number (Number 73-1469927) at JP Morgan Chase Bank, N.A. in Houston, Texas [hereafter CCA's account];

and further requesting that duplicate copies of the December, 2005, bank statement, and all subsequent monthly statements on the aforementioned specifically identified account, be sent, in *addition* to where currently sent, to the attention of Vikki Canfield, M.D., President-Elect of CCA and Daron Street. M.D., President of CCA, at their home addresses; and

WHEREAS, pursuant to such request said bank has not, to date, produced the December 2005 or January 2006 bank statements as requested on January 17, 2006 or the bank statements requested on February 15th, 2006, and has produced only an isolated part of the resolutions, signature cards, agreements and authorizations requested regarding CCA's bank account; and

WHEREAS JPMorgan Chase Bank, N.A., has not produced the initial 2002 corporate resolution setting up the account and designating authorized signatories, as repeatedly requested, but instead produced only a "replacement" resolution signed by George Morgan, holding himself out to be CCA's corporate secretary and/or assistant secretary and Chief Operating Officer when, in fact, George Morgan has never been CCA's corporate Secretary, Assistant Secretary or Chief Operating Officer and has never been an officer, director or shareholder of CCA; and

WHEREAS as late as January 19, 2006, one day after CCA formally requested records regarding its account from JPMorganChase Bank, N.A., Vikki Hitzhusen as CAO/VP Finance of US Oncology, on US

Oncology letterhead authorized changes to CCA's account, which records have not been produced for CCA's inspection even though requested; and

WHEREAS there appears to be persons not authorized by CCA directing changes to CCA's account and authorizing signatories to CCA's account although JPMorgan Chase Bank, N.A., has been able to produce for CCA's inspection no authority therefore; and

WHEREAS from January 18, 2006, until February 14, 2006, JPMorganChase Bank, N.A., refused to acknowledge that CCA was the owner of the aforementioned bank account or release copies of any records related thereto; and

WHEREAS, CCA has been as of yet unable to confirm that there exists in the records of JPMorganChase Bank, N.A., any legitimate authorization by CCA of the persons purporting to act or authorize transactions on CCA's account and/or authorize the "Automatic Dollar Transfer Service", "Transfer Solutions Service Agreement" or any other transfer or processing instructions on CCA's account; and

WHEREAS, as a result of the above stated factors, there are no officers, directors or shareholders of CCA currently reflected on the Commercial & Fiduciary Signature Cards for CCA's account and all ostensibly authorized signatories on such account appear to be only officers and directors of US Oncology, Inc. and/or US Oncology Corporate, Inc.;

WHEREAS legal counsel for JPMorganChase Bank, N.A., suggested to CCA's counsel that CCA should file a corporate resolution and an authorized signature card designating a person or persons to transact business or authorize transactions on CCA's account; and

WHEREAS by reason of the above stated facts JPMorganChase Bank, N.A., on February 14th, 2006; on its own initiative, placed a "freeze" on CCA's bank account for all purposes except deposits thereby rendering such funds and revenues of CCA inaccessible to CCA for any purpose.

BE IT THEREFORE RESOLVED BY THE BOARD OF DIRECTORS OF CCA that a corporate resolution be, and hereby is, unanimously approved revoking any and all prior signature cards or other document pertaining to CCA's account which have been at any time tendered to JPMorgan Chase Bank, N.A., granting, or purporting to grant, to any persons) or entity, actual, ostensible or apparent authority regarding CCA's account including, *but not limited to*, authority to (a) sign, implement, direct or approve any agreement, order or instruction pertaining to CCA's account (b) add, delete or change authorized signatories on CCA's account (c) initiate, implement, approve or direct cash withdrawal, wire, sweep, intra bank or other transfers from CCA's account to any other account (d) direct, approve, implement or initiate "Automated Clearinghouse", a/k/a *ACH,* transfers or debits from CCA's account, with or without signature (e) direct, approve, implement or initiate "Depository

Transfer Checks", a/k/a/ DTC, or payments pertaining to or from CCA's account (f) approve, implement direct or effectuate the payment, transfer or withdrawal of funds from CCA's account by wire computer or other electronic means (g) issue, approve, direct or execute checks, drafts, or other orders for the payment of money from CCA's account by facsimile signature or otherwise (h) act as CCA's authorized agent or on CCA's behalf in any manner pertaining to CCA's account (i) close CCA's account or open other accounts in CCA's name or tax ID # (j) execute any agreements on behalf of CCA pertaining to CCA's account (k) transact any business or authorize, execute, implement approve or order any act, transaction or agreement on behalf of CCA or pertaining to CCA's account. **RESOLVED** that this revocation is intended by the Board to be immediately and fully effective irrespective of whether or not such actual, ostensible or apparent authority is valid or invalid and/or based on real or falsified corporate authorization, resolution or certificate and irrespective of the form, time, circumstances or manner by which such authority was granted or purported to be granted.

BE IT FURTHER RESOLVED BY THE BOARD OF DIRECTORS OF CCA that the following documents granting, or purporting to grant, actual, ostensible or apparent authority regarding CCA's account specifically be, and they hereby are, immediately, fully and effectively **revoked by the CCA Board** irrespective of whether or not such actual, ostensible or apparent authority is valid or

invalid and/or based on real or falsified corporate authorization:

(1) "Commercial & Fiduciary Signature Cards" (two) dated September 25, 2002; and

(2) A document entitled "Automatic Dollar Transfer Service", a form containing authorization, directions and/or instructions authorizing the transfer of funds from CCA's bank account to "US Oncology Corporate" account with all charges to be paid by CCA effective 9-27-02 and expiring on 1-1-2120; and

(3) A document entitled "Implementing and Processing Instructions" a form containing authorization, directions and/or instructions pertaining to CCA's account and signature dated on 10-7-02 and

(4) A document entitled "Corporate Secretary's Certificate Regarding Accounts" dated May 17, 2004, purporting to be CCA's corporate certificate and signed by George P. Morgan purporting to be the corporate secretary, assistant secretary and/or "Chief Operating Officer" of CCA;

(5) "Commercial & Fiduciary Signature Card" dated May 17, 2004; and

(6) "Commercial & Fiduciary Signature Card" dated May 17, 2004 (appears to be a duplicate of #5); and

(7) "Commercial & Fiduciary Signature Card" striking one name from #5 and re-scanned on April 19, 2005; and

(8) A document entitled "Change Certificate for Commercial Accounts" dated April 18, 2005, adding and deleting names and signed by George Morgan; and

(9) A letter on US Oncology stationary directing a change to CCA's account leaving Bruce Broussard as the only ostensible authorized signatory on CCA's account

BE IT FURTHER RESOLVED BY THE BOARD OF DIRECTORS OF CCA that from and after the date this resolution is tendered to an officer, director or agent of JPMorganChase Bank, N.A., or until further resolution of this Board, the only persons authorized by CCA as signatories on CCA's account shall be Daron Street, M.D., President of CCA **and/or** Vikki A. Canfield, M.D., Immediate Past President and President-Elect of CCA, and/or Craig Reitz, M.D., Board Member of CCA, all of whom are shareholders of CCA and all of whom are hereby exclusively designated by CCA as being authorized to (a) sign, implement, direct, approve or revoke any agreement, order or instruction pertaining to CCA's account (b) add, delete or change authorized signatories on CCA's account (c) initiate, implement, approve, direct or restrict cash withdrawal, wire, sweep, infra bank or other transfers from CCA's account to any other account (d) direct, approve, implement,

initiate or restrict "Automated Clearinghouse", a/k/a ACH, transfers or debits from CCA's account, with or without signature (e) direct approve, implement initiate or restrict "Depository Transfer Checks", a/k/a DTC, or payments pertaining to or from CCA's account (f) approve, implement, direct, restrict or effectuate the payment, transfer or withdrawal of funds in CCA's account by wire computer or other electronic means (g) issue, approve, disapprove, direct or execute checks, drafts, or other orders for the payment of money from CCA's account by facsimile signature or otherwise (h) act as CCA's authorized agent or on CCA's behalf in any manner and for all purposes pertaining to CCA's account (i) close CCA's account or open other accounts in CCA's name or tax ID # (j) execute or revoke any agreements on behalf of CCA pertaining to CCA's account (k) transact any business or authorize, execute, implement, approve, direct or order any act, transaction or agreement on behalf of CCA or pertaining to CCA's account, and revoke any pre-existing authority, instructions, agreements, directions or authority pertaining to CCA's account. It is CCA's intention that said persons be, and they hereby are, authorized to exercise all authority and conduct any and all business, actions and transactions pertaining to CCA's account without restriction or limitation.

BE IT FURTHER RESOLVED BY THE BOARD OF DIRECTORS OF CCA that JPMorganChase Bank, N.A., be, and it hereby is, directed to immediately terminate, block, restrict and prevent

any and all withdrawals, ACH transfers and/or intra-bank transfers, whether by sweep or otherwise, from or against CCA's account unless hereafter authorized by CCA Board resolution and/or the specific written authorization of either one or more of the following: Daron Street, M.D., or Vikki A, Canfield, M.D., or Craig Reitz, M.D., for and on behalf of CCA.

BE IT FURTHER RESOLVED BY THE BOARD OF DIRECTORS OF CCA that all previous actual, ostensible or apparent authorization[s] or agreement[s] for transfers of funds, whether automatic or otherwise, from CCA's account to the accounts of US Oncology, Inc., US Oncology Corporate, Inc., or any other person or corporations' account, including but not limited to transfers authorized and made pursuant to or in accordance with the "Automatic Dollar Transfer Service", "Transfer Solutions Service Agreement" or any other transfer authorization or instructions, whether authorized by wire, sweep, intra bank transfer or otherwise, be, and they hereby are, revoked and no longer effective for any purpose.

BE IT FURTHER RESOLVED BY THE BOARD OF DIRECTORS OF CCA that any authorization or authority to transfer funds by any means whatsoever, whether automatically or otherwise, from CCA's account to any other account not owned and controlled by CCA, automatically or otherwise, can only be hereafter authorized and effectuated on behalf of CCA by the written authorization of one

or more of the following: Daron Street, M.D., or Vikki A, Canfield, M.D., or Craig Reitz, M.D.

BE IT FURTHER RESOLVED BY THE BOARD OF DIRECTORS OF CCA that the President of the Board cause a copy of this resolution to be delivered to JP Morgan Chase Bank, N.A., as expeditiously as possible together with any other documents deemed necessary and appropriate to effectuate the purposes hereof including, but not limited to authorized replacement signature cards and/or an replacement or other corporate resolution pertaining to CCA's account.

CORPORATE SECRETARY'S CERTIFICATE AND VERIFICATION

I hereby certify that I am the duly elected and qualified Secretary and keeper of the minutes and corporate minute book of Oklahoma Oncology & Hematology, P.C., d/b/a Cancer Care Associates [CCA], operating with the Tax I.D. Number 73-1469927, which is a professional corporation organized, existing and in good-standing under the laws of the State of Oklahoma. I further certify that the Board of Directors of CCA, at a meeting held after notice on February 16, 2006, with a quorum present and voting, unanimously approved the hereinabove resolution.

In witness hereof, I have hereunto subscribed my name and affixed the seal of Oklahoma Oncology &

Hematology, P.C., doing business as Cancer Care Associates, on this 23rd day of February, 2006.

(CORPORATE SEAL)

/s/ S. Durica, MD.
Sherri S. Durica, M.D.,
Secretary of Cancer Care Associates

OFFICIAL CHECK

JPMorganChase [LOGO]

NO 754498859
DATE 02/24/06
CLERK M. TUCKER

PAY
EXACTLY $4,029,589 dols 72 cts
Four Million Twenty Nine Thousand Five Hundred Eighty Nine dollars and 72 cents

AMOUNT
$4,029,589.72

PAY TO THE ORDER OF MICHAEL MILBY, CLERK U.S. DISTRICT COURT

Drawer: JPMORGAN CHASE BANK, N.A.

/s/ [Illegible signatures]
MP AUTHORIZED SIGNATURE
Issued by Integrated Payment Systems Inc., Englewood, Colorado To CitiBank N.A., Buffalo, NY

[Copy Of Actual Check Omitted In Printing]

2007 OK 12

OKLAHOMA ONCOLOGY & HEMATOLOGY P.C., an Oklahoma Professional Corporation, d/b/a Cancer Care Associates, Appellant,

v.

US ONCOLOGY, INC., a Delaware Corporation, and AOR Management Company of Oklahoma, Inc., a Delaware Corporation, Appellees.

Nos. 102,673, 102,612

Supreme Court of Oklahoma.

March 15, 2007

Appeal from the District Court of Tulsa County; The Honorable David L. Peterson, Presiding.

Oklahoma Oncology & Hematology, P.C., d/b/a Cancer Care Associates filed suit against its business manager, AOR Management Company of Oklahoma, Inc., and the business manager's parent corporation, U.S. Oncology, Inc. The suit sought declaratory judgment and damages for multiple contract and tort claims arising out of the management of plaintiff's medical oncology business. The business manager had a pending arbitration complaint. The district court stayed the arbitration. The defendants moved to lift the stay and compel arbitration. Plaintiff opposed arbitration, asserting that there was no valid enforceable arbitration agreement and that the costs of arbitration are so exorbitant as to be unconscionable. Plaintiff requested the district court to conduct an

evidentiary hearing before ruling on the motion to compel arbitration. The district court referred all of plaintiff's claims to arbitration without conducting an evidentiary hearing. Plaintiff appealed and filed an original action in the event the order compelling arbitration is determined to be non-appealable. We previously determined the pre-judgment order is a final appealable order. We retained the appeal, consolidated the original action with the appeal, and stayed the arbitration proceeding during the pendency of this appeal.

ORDER COMPELLING ARBITRATION REVERSED AND CAUSE REMANDED WITH INSTRUCTIONS; ORIGINAL JURISDICTION DENIED.

Lana Jeanne Tyree, Cartwright & Tyree, Oklahoma City, Oklahoma, and John H. Tucker, Rhodes, Hieronymus, Jones, Tucker & Gable, PLLC, Tulsa, Oklahoma, for appellant.

James M. Sturdivant and Timothy A. Carnery, Gable & Gotwals, Tulsa, Oklahoma, for appellees.

TAYLOR, J.

The basic question in this appeal and the consolidated original action is whether the district court erred in sending all claims in this suit to arbitration. We find the district court erred in compelling arbitration and reverse the arbitration order. We remand this case to the district court with instructions.

I. The Proceedings Below

The following are basic facts gleaned from the district court filings and the arguments in this Court.[1] Plaintiff/appellant, Oklahoma Oncology & Hematology P.C., d/b/a Cancer Care Associates (CCA), is an Oklahoma professional corporation of Oklahoma-licensed physicians who engage in the practice of medical oncology, hematology, and radiation oncology throughout the state of Oklahoma. CCA has more than sixty full-time, part-time, and contract physicians, and it has offices in Tulsa, Oklahoma City, Norman, Bartlesville, McAlester, Muskogee, Pryor, Enid, Vinita, and Stillwater.

Defendant/appellee AOR Management Company of Oklahoma, Inc. (AOR-OK) is a Delaware corporation incorporated in 1995 to provide business management services in Oklahoma to CCA. AOR-OK was a wholly-owned subsidiary of American Oncology Resources, Inc. (AOR) until it became a wholly-owned subsidiary of defendant/appellee U.S. Oncology, Inc. (USON) in 1999.[2] Since its inception, AOR-OK has

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[1] The parties have not stipulated to the basic facts set out in this opinion, and on remand these facts may be contested.

[2] The appellate record indicates that, in 1995, there were two oncology management companies with the expertise to be the business manager for groups of physicians with oncology medical practices. They were Physician Reliance Network, Inc. (PRN) located in Dallas Texas, and AOR located in Houston, Texas. In 1999, AOR and PRN merged and became USON. USON is a Delaware corporation located in Houston, Texas. USON is not registered to do business in Oklahoma.

maintained its corporate office in the offices of CCA in Tulsa, Oklahoma.

This controversy has its origin in a business transaction that occurred in 1995, whereby AOR-OK became the business manager for the oncology medical practices of the CCA physicians. The transactional documents executed in March, 1995, included the Management Services Agreement (MSA) between CCA and Oncology and Hematology Management Partnership, a Texas General Partnership (the Texas partnership) and a Purchase Agreement executed by AOR, AOR-OK, CCA, Oklahoma Oncology & Hematology P.C., and more than fifteen physicians.

The MSA is the central contract in this controversy. The MSA was executed by only one person, Alan M. Keller, M.D., a CCA physician. Dr. Keller executed the agreement both on behalf of the Texas general partnership and on behalf of CCA.[3] Even

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[3] The record contains an affidavit of Dr. Keller stating that he has been a licensed physician in Oklahoma since 1978, he is a physician with CCA, he was a shareholder and president of the predecessor to CCA, and he signed the MSA on behalf of the physicians at CCA by virtue of limited powers of attorney drafted by AOR. The affidavit does not provide any information as to this Oklahoma physician's representation of the Texas partnership. The affidavit does state that the transaction documents were drafted by AOR and that AOR was unwilling to negotiate the terms of the documents because they "were intended to be standardized agreements that needed to be uniform between practices they managed." Apparently, Dr. Keller's representation of the Texas partnership was at the behest of AOR.

though it is a contract between CCA and the Texas partnership, the MSA provided for AOR to succeed to all the rights and obligations of the Texas partnership thereunder, it directed AOR to assign its rights and obligations under the MSA to AOR-OK, and it designated AOR-OK as the business manager for CCA.[4]

The MSA prescribed the duties and obligations of CCA and AOR-OK for the business management of the oncology medical practices of the CCA physicians. The MSA has a forty-year term with automatic renewal every five years thereafter. The MSA fixed AOR-OK's business management fees for the first five years at a "monthly fee" in the amount equal to the "fixed amount" plus seven percent of the adjusted gross revenue. The "fixed amount" for the first sixty months ranged from $325,890 to $359,013 under the schedule in the MSA. However, the "fixed amount" was increased by several amendments to the MSA.

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[4] The transactional documents executed in March, 1995, included the assignment of the MSA from AOR to AOR-OK and a special power of attorney to AOR-OK. The assignment from AOR, as successor in interest to the Texas partnership, "sold, transferred, assigned and conveyed" to AOR-OK "all revenues, payments, profits, proceeds, awards, compensation, instruments, documents, actions, causes of action, benefits, rights, refunds, monies, and property of every kind . . . emanating from that one certain Management Services Agreement . . . and all other rights, powers, privileges and remedies of Assignor thereunder (the 'contract rights')." The special power of attorney from CCA authorized AOR-OK to handle the billing of CCA's patient accounts and the receiving, collecting, and depositing of patient fees.

The first amendment was in January of 1997 and the last was in October of 1999. Each amendment was in writing and executed on behalf of AOR-OK and CCA. After the first five years, the MSA provided for a "monthly fee" equal to 24.7% of the adjusted gross revenue.[5]

The working relationship between CCA and AOR-OK during the first five years apparently disintegrated after USON became the parent corporation of AOR-OK. According to CCA, USON has taken control of CCA's administrative and financial business, its money and accounts, and its books and records. On January 26, 2005, CCA notified AOR-OK that it considered the MSA to be illegal, against public policy, and void *ab initio* under Oklahoma law. Two days later, on January 28, 2005, AOR-OK filed an arbitration complaint asking that the business management fee provisions in the MSA be reformed.

In the arbitration complaint, AOR-OK alleged that 1) macro-economic changes in the cancer care

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[5] The MSA defined "adjusted gross revenue" as the sum of professional services revenues and ancillary revenue. It defined "professional services revenues" as all professional fees actually recorded each month on an accrual basis for professional medical services and related health care services rendered by the physicians and capitation revenues allocated to professional services revenues. And, it defined "ancillary revenue" as all other revenue actually recorded each month. Simply stated, the MSA provided that the business management fee, after the first five years, was to be 24.7% of CCA's accrued patient revenues and all other accrued revenue.

industry during the past several years resulted in a substantially lower business management fee for AOR-OK, 2) CCA and AOR-OK have been unable to agree to any changes in the business management fee since 1999, and 3) AOR-OK resigned itself to fulfilling the MSA for substantially less profit than had been anticipated. It further alleged that the change in reimbursement rates in the Medicaid Modernization Act of 2003 directly impacts the amount of the business management fee in the MSA.

The arbitration complaint referred to section 7.2(d) of the MSA as authorizing arbitration for the purpose of rewriting the business management fee provisions in the MSA. Section 7.2(d) provides for the parties to negotiate in good faith concerning a new service arrangement or a new basis for compensation as may be necessary due to change in Medicare/Medicaid law, state law or change in any third party reimbursement system; and if the parties cannot agree to a new service arrangement or basis for compensation, it provides for the matter to be sent to binding arbitration.

The relief sought in the arbitration complaint is "a judgment that would reform the terms of the MSA such that AOR Management [AOR-OK] would be compensated at a level that approximates as closely as possible its economic position that it was in prior to changes caused by the MMA [Medicaid Modernization Act]." The arbitration complaint also seeks "costs and expenses, including reasonable attorneys' fees,

for prosecution of this proceeding, as well as any further relief to which it justly may be entitled."

CCA did not answer the arbitration complaint. Instead, it filed suit in the Tulsa County District Court on February 14, 2005. The amended petition asserts that the MSA is contrary to established public policy in that it allows AOR-OK to engage in the unlicensed and unauthorized practice of medicine, to split patient revenues, and to exert dominion and control over CCA's medical practice and financial affairs. It further asserts that USON is treating CCA as if it is a wholly-owned subsidiary of USON by exercising dominion and control over CCA's entire business. The amended petition asks the district court to declare that the MSA was void *ab initio* and unenforceable and that there is no valid contract between the parties. It also sought a stay of arbitration and an award of compensatory and punitive damages for breach of contract, fraud and deceit, conversion, and misappropriation and embezzlement, together with interest, costs, and attorney fees against both AOR-OK and USON.

CCA also sought an emergency stay of AOR-OK's arbitration proceeding until the district court decides whether the MSA is contrary to Oklahoma law and public policy and void *ab initio.* The district court stayed the arbitration.

Neither AOR-OK nor USON answered the district court petition. They filed a motion to lift the stay and to compel arbitration. The motion urged

arbitration under section 8.6 of the MSA which provides for any controversy, dispute, or disagreement arising out of or relating to the MSA to be submitted to binding arbitration in accordance with Article XI of the Purchase Agreement. Article XI of the Purchase Agreement calls for mediation under the Commercial Mediation Rules of the American Arbitration Association and for binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association.

CCA responded that arbitration proceedings under the Commercial Arbitration Rules of the American Arbitration Association are cost prohibitive. CCA requested an evidentiary hearing on its allegations that 1) there is no valid and enforceable contract between the parties, 2) the costs of arbitration are so excessive as to be unconscionable, and 3) AOR-OK's and USON's management of CCA's business under the MSA is illegal.

The district court received briefs on the enforceability of the arbitration provisions and heard argument of counsel but did not conduct an evidentiary hearing. The district court ruled in favor of AOR-OK and USON on their motion to compel arbitration, dissolved the stay of arbitration, and referred all of CCA's claims to arbitration.

CCA timely appealed the order compelling arbitration and also filed an original action in the event the order compelling arbitration should be declared a non-appealable order. The amended application to

assume original jurisdiction asked for relief via a writ of mandamus similar to the relief sought in this appeal.[6] It also asserted that this controversy involves matters of state-wide concern and asked this Court to exercise its original jurisdiction to decide if our state law and public policy may be circumvented by an arbitration clause and the federal arbitration law.

II. The Appeal

In the pre-decisional stage of this appeal, we determined that the prejudgment order compelling arbitration and staying further proceedings in the district court is a final appealable order, citing 12 O.S.2001, § 953, and *Gilliland v. Chronic Pain Associates, Inc.*, 1995 OK 94, 904 P.2d 73. After *Gilliland*, the United States Supreme Court construed the Federal Arbitration Act (FAA)[7] as prohibiting an appeal from an order compelling arbitration and staying the federal district court proceeding on remaining claims. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 86-87, 121 S.Ct. 513, 519-520, 148 L.Ed.2d 373 (2000). We have considered *sua*

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[6] In the original action, CCA sought a writ of mandamus directing the district court to stay arbitration, to conduct an evidentiary hearing after reasonable discovery, and to determine whether there exists a valid and enforceable agreement to arbitrate between the parties. We consolidated the original action with the appeal. We treated the original proceeding as seeking a stay pending appeal and stayed the arbitration proceeding during the pendency of this appeal.

[7] 9 U.S.C. §§ 1, *et seq.*

sponte[8] whether *Gilliland* is consistent with *Green Tree*.[9] Each opinion tested the respective pre-judgment arbitration-related order under the established meaning of "final order." The "final order" analysis under the federal arbitration statutes in *Green Tree*[10] is analogous to the "final order" analysis under Oklahoma's arbitration statutes in *Gilliland*.[11]

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[8] This Court has a duty to inquire into the propriety of its jurisdiction. *Fields v. A & B Electronics,* 1990 OK 7, ¶ 4, 788 P.2d 940, 941.

[9] Although the district court order did not determine that the MSA, or any other agreement involved in this litigation, is a contract affecting interstate commerce and governed by the FAA, that issue may be raised on remand. Accordingly, we approach this appeal mindful of the federal arbitration law.

[10] Under the FAA, an appeal may be taken from a final decision with respect to arbitration, 9 U.S.C. § 16(a)(3), but an appeal may not be taken from an interlocutory order compelling arbitration. 9 U.S.C. § 16(b)(2). In deciding whether an order compelling arbitration and dismissing the suit was final, *Green Tree* followed the established meaning of a "final decision." *Green Tree* concluded that the order compelling arbitration and dismissing the suit left no claims pending in federal court and was a final appealable order, while an order compelling arbitration and staying the suit in federal court would be an interlocutory non-appealable order. 531 U.S. at 87-88, 121 S.Ct. at 520-521.

[11] The state arbitration statutes list arbitration-related orders from which an appeal may be taken, 15 O.S.2001, § 817, now codified at 12 O.S.Supp.2005, § 1859, but do not contain language prohibiting an appeal from an order compelling arbitration similar to 9 U.S.C. § 16(b)(2). *Gilliland* determined that the statutory list of appealable arbitration-related orders is not exclusive and that, in the absence of a § 16(b)(2) prohibition against appeal, a pre-judgment order compelling arbitration

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We stand on our pre-decisional ruling in this case. The order sending "all claims raised by Plaintiff" to arbitration reached the whole controversy and left nothing pending before the district court.[12] Whether analyzed under the FAA or Oklahoma's Uniform Arbitration Act (OUAA),[13] the pre-judgment order

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may be a final appealable order under the general appeals statutes, 12 O.S.2001, §§ 952 and 953.

[12] The pre-judgment order compelling arbitration left no claims pending, and it effectively precluded CCA from "proceeding further in the case for the pursuit of the very relief it was seeking." *Gilliland,* at ¶ 8, 904 P.2d at 77. It precluded a declaratory judgment as to the status of CCA and USON under the MSA (CCA alleged that USON is an interloper with no legal authority or contractual right to manage CCA's business) and a declaratory judgment that the MSA is against the public policy of the state of Oklahoma and illegal (CCA alleged the MSA, contrary to Oklahoma law, allows for patient fee splitting and corporate practice of medicine and therefore it is void *ab initio*). Similar to an end-of-the-line dismissal, the order compelling arbitration is a final appealable order under our general appeals statutes, 12 O.S.2001, §§ 952 and 953.

[13] Oklahoma's uniform arbitration act, 15 O.S.2001, §§ 801, et seq., is now codified at 12 O.S.Supp.2005, §§ 1851-1881. 2005 Okla.Sess. Laws, ch.364. Effective January 1, 2006, the 2005 legislation expressly applies to all arbitration agreements without regard to the date of the agreement. 12 O.S.Supp.2005, § 1854.

In the district court, AOR-OK and USON urged that Texas law governs this dispute as set out in the MSA. CCA responded that, under Texas law, Oklahoma law would be applied to this case because, among other reasons, it concerns the practice of medicine and the business management of the practice of medicine all within Oklahoma. CCA reargued it [sic] position on appeal. On the other hand, AOR-OK and USON effectively abandoned Texas

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compelling all claims to arbitration and staying further district court proceedings in this case is a final appealable order. Upon CCA's motion, we retained the appeal.

III. The Issues on Appeal

The district court entered a general order in favor of AOR-OK and USON, sending all of CCA's claims to arbitration. The district court did not conduct the evidentiary hearing requested by CCA before compelling arbitration. The district court did not enter any specific findings or conclusions, and its general order compelling arbitration did not otherwise directly address many of the questions raised in the parties' arguments. However, a finding that CCA agreed that this controversy should be resolved by binding arbitration is embraced in the general order in favor of AOR-OK and USON.[14] We must affirm the general order compelling arbitration unless we find that the district court erred in 1) finding the existence of a valid enforceable arbitration agreement between CCA and AOR-OK and USON or 2) sending all of

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law by their reliance on Oklahoma's arbitration statutes and *Rogers v. Dell Computer Corp.*, 2005 OK 51, 138 P.3d 826.

[14] A general ruling in favor of a party embraces each finding necessary to sustain the judgment. *Burdick v. Indep. School Dist. No. 52 of Okla. County*, 1985 OK 49, ¶ 12, 702 P.2d 48, 54; *Lester v. Streich*, 1935 OK 862, 57 P.2d 246, 248. A finding of the existence of a valid enforceable arbitration agreement is necessary to support the order sending all of CCA's claims to arbitration.

CCA's claims to arbitration without conducting an evidentiary hearing on the existence of a valid and enforceable arbitration agreement and the expense of arbitration under the Commercial Arbitration Rules of the American Arbitration Association before referring all of CCA's claims to arbitration.

IV. The Standard of Review

The question as to the existence of valid enforceable agreements to arbitrate all of CCA's claims in this case against AOR-OK and USON is a question of law to be reviewed by a *de novo* standard, *Rogers v. Dell Computer Corp.,* 2005 OK 51, ¶ 18, 138 P.3d 826, 831, without deference to the lower court. *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30,* 2003 OK 30, ¶ 5, 66 P.3d 442, 445. The question as to whether the district court, before referring all claims to arbitration, should have conducted an evidentiary hearing relating to the existence of a valid enforceable arbitration agreement and to the expense of arbitration under the Commercial Arbitration Rules of the American Arbitration Association is a procedural question left to the discretion of the district court, *Rogers* at ¶ 17, 138 P.3d at 830-831, and the district court's ruling thereon will not be disturbed on appeal in the absence of clear abuse. *Eskridge v. Ladd,* 1991 OK 3, ¶ 12, 811 P.2d 587, 590.

V. Federal Arbitration Law

Both sides of this controversy rely on federal court jurisprudence and both argue that the other one's position is inconsistent with federal arbitration law. Whether a contract affects interstate commerce under the FAA often involves questions of fact and law. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003). Here, the district court did not find the evidence demonstrates that the business management of CCA involves interstate commerce nor did it conclude that the business management agreement falls within the FAA. Even so, we review the arbitration provisions in light of applicable principles of arbitration law developed under the FAA.

The FAA embodies a liberal policy favoring enforcement of arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983). It requires state and federal courts to honor arbitration agreements duly entered into by the parties and to order the parties to arbitrate their disputes when they have agreed to do so. *Id.*, 460 U.S. at 25, n. 32, 103 S.Ct. at 942. It ensures "judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 105 S.Ct. 1238, 1241, 84 L.Ed.2d 158 (1985).

Although the FAA favors arbitration when it is the parties' contractual choice of a remedial forum, *id.*, 470 U.S. at 220, 105 S.Ct. at 1242, the courts will

not impose arbitration upon parties where they have not agreed to do so. *Id.*, 470 U.S. at 219, 105 at S.Ct. at 1242. The courts will enforce arbitration agreements according to the terms of the parties' contract, as "[a]rbitration is a matter of consent, not coercion." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). To assure that the parties have consented to arbitration, the courts will decide whether there is a valid enforceable arbitration agreement, whether the parties are bound by the arbitration agreement, and whether the parties agreed to submit a particular dispute to arbitration. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). The courts will not require a party to submit a controversy to arbitration where it has not been so agreed. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 591, 154 L.Ed.2d 491 (2002).

VI. The Parties to the Arbitration Agreement

Under the above federal arbitration law, a court must send a controversy to arbitration when a party brings forth a valid enforceable agreement to arbitrate the controversy. State law is similar. 12 O.S.Supp.2005, § 1858 (A). Here, both AOR-OK and USON moved for arbitration under the MSA. CCA alleged that AOR-OK and USON are two separate and distinct Delaware corporations, one with its offices in Tulsa, Oklahoma, the other with its offices in Houston, Texas, and one registered to do business

in Oklahoma and the other not so registered. Neither AOR-OK nor USON dispute these allegations. AOR-OK and USON argued that USON could arbitrate the dispute with CCA because of its operating subsidiary, AOR-OK,[15] while CCA argued that USON is an interloper with no legal authority or contractual right to manage CCA's business.[16]

Having perused the MSA, it appears, beyond argument, to be a contract between CCA and AOR-OK by assignment. USON has not alleged that it is a party to the MSA, and there is no evidence in the appellate record tending to prove that fact. Further, USON does not dispute that it is a separate corporate entity distinct from AOR-OK. But, AOR-OK and USON, at least implicitly, argue that they act as one

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[15] AOR-OK and USON argued in the district court, at least by implication, that they should be treated as one. In their appellate answer brief, AOR-OK and USON take a similar position. They assert that AOR-OK is a wholly-owned subsidiary of USON and that USON is "a nationwide health management company" that "manages the business aspects of over 850 physicians in numerous groups located in 28 states" by virtue of "agreement between U.S. Oncology's direct and indirect subsidiaries and numerous physician groups."

[16] In its appellate brief in chief, CCA again asserts that even though "AOR-OK is the contractually designated 'business manager,' USON without legal or contractual authority is the de facto 'business manager' of CCA, controlling its personnel, practice, revenues, operations, business and administrative affairs although a non-domesticated and medically unlicensed foreign corporation."

legal entity.[17] This argument suggests that the courts ignore their separate and distinct corporate identities which we will not do on this record.[18]

The issue as to the existence of an arbitration agreement presents a gateway question about whether the parties are bound by a given arbitration

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[17] Generally, a corporation is a distinct legal entity separate and apart from other legal entities unless separate corporate existence is a scheme to perpetrate a fraud or one corporation is organized and controlled by the other corporation as a mere instrumentality or adjunct so that it is a dummy or sham corporation. *Tulsa Tribune Co. v. State ex rel. Okla. Tax Comm.*, 1989 OK 13, ¶¶ 20-21, 768 P.2d 891, 893; *Gulf Oil Corp. v. State*, 1961 OK 71, ¶ 10, 360 P.2d 933, 936.

[18] Under the principles of agency law or the doctrine of piercing the corporate veil, the law may disregard corporate distinctions and treat two separate legal entities as one. *Frazier v. Bryan Mem'l Hosp. Auth.*, 1989 OK 73, ¶ , 775 P.2d 281, 288. The nature of the relationship is critical to pierce the corporate veil. *Frazier* involved the Hospital Corporation of America and its wholly-owned subsidiary HCA Management Company, Inc. Although the subsidiary had the management agreement with the hospital authority to operate the hospital, Frazier sued the hospital and the parent corporation but not the subsidiary, alleging negligence in the creation and implementation of employment and administrative policies in the operation of the hospital under the management agreement. The parent corporation moved for and was granted summary judgment because it was not a party to the management agreement. In *Frazier*, this Court found material facts regarding the nature of the relationship between the parent company and its subsidiary to be in dispute and reversed the summary judgment. Although CCA alleged that USON has assumed AOR-OK's role under the MSA, there is no evidence in this appellate record showing the nature of the relationship between AOR-OK and USON.

clause and raises a "question of arbitrability" for a court to decide. *See* 12 O.S.Supp.2005, § 1857; *Howsam,* 537 U.S. at 84, 123 S.Ct. at 592. There is nothing in this appellate record indicating USON is a party to the MSA, and it goes without saying that a stranger to a contract neither enjoys the contract benefits nor carries the contract obligations. However, USON will have an opportunity to produce any evidence it may have proving it is bound by the MSA in further proceedings in the district court on remand.

VII. The Arbitration Agreement

AOR-OK and USON contend that CCA's agreement to arbitrate the instant controversy is set out in two provisions in the MSA and one provision in the Purchase Agreement. Those provisions are 1) section 7.2(d), which requires binding arbitration to change the terms of the contract, 2) section 8.6, which requires binding arbitration to settle controversies, disputes and disagreements arising out of the MSA, and 3) section 11.01 of the Purchase Agreement, which requires mediation and binding arbitration to settle controversies, disputes and disagreements arising out of the Purchase Agreement. The provisions of arbitration agreements will be examined under general principles of state contract law. *Kaplan,* 514 U.S. at 944, 115 S.Ct. at 1924.

The following elementary rules of contract law are applicable here. The courts will read the provisions of a contract in their entirety, *Mortgage Clearing Corp. v. Baughman Lumber Co.*, 1967 OK 232, ¶ 11, 435 P.2d 135, 138, to give effect to the intention of the parties as ascertained from the four corners of the contract, and where the language is ambiguous, it will be interpreted in a fair and reasonable sense. *Id.*, at ¶ 13, 435 P.2d at 139; 15 O.S.2001, §§ 155 and 157.[19] The courts will read the contract language in its plain and ordinary meaning unless a technical meaning is conveyed. *Pitco Production Co. v. Chaparral Energy, Inc.*, 2003 OK 5, ¶ 14, 63 P.3d 541, 545-546. The courts will decide, as a matter of law, whether a contract provision is ambiguous and interpret the contract provision as a matter of law, *id.*, at ¶ 12, 63 P.3d at 545, where the ambiguity can be cleared by reference to other provisions or where the ambiguity arises from the contract language and not from extrinsic facts. *Paclawski v. Bristol Laboratories, Inc.*, 1967 OK 21, ¶ 24, 425 P.2d 452, 456.

Guided by these rules, we review the arbitration provisions. Section 7.2(d) of the MSA requires the parties to agree to a **new service arrangement or**

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[19] 15 O.S.2001, § 155 provides: "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this article." 15 O.S.2001, § 157 provides: "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others."

a new basis for compensation for the services and thereby amend those provisions in the MSA whenever specific **external forces** affect the manner in the which the management service will be performed or compensated. If the parties cannot agree on the changes in the contract, the plain meaning of the words in section 7.2(d) is that an arbitrator will arbitrarily rewrite those provisions in the contract.[20] This section does not deal with controversies arising out of the contract to which the parties have agreed. It does not deal with disputes as to the meaning of

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[20] Subsection (d) of Section 7.2 *Termination* provides:

> (d) *Legislative, Regulatory or Administrative Change.* In the event there shall be a change in the Medicare or Medicaid statutes, State statutes, case laws, regulations or general instructions, the interpretation of any of the foregoing, the adoption of new federal or State legislation, or a change in any third party reimbursement system, any of which are reasonably likely to materially and adversely affect the manner in which either party may perform or be compensated for its services under this Management Services Agreement or which shall make this Management Services Agreement unlawful, **the parties shall immediately enter into good faith negotiations regarding a new service arrangement or basis for compensation for the services furnished pursuant to this Management Services Agreement that complies with the law, regulation, or policy and that approximates as closely as possible the economic position of the parties prior to the change**. If good faith negotiations cannot resolve the matter, **it shall be submitted to arbitration as referenced in Section 8.6**.

(Bold added.)

the contract terms nor does it deal with the application or performance of the contract to which the parties have agreed. This arbitration provision does not concern "a controversy arising out of such contract or transaction" under the FAA or the OUAA.[21] It concerns the parties' failure to mutually agree to amend the MSA to provide new terms for the management services or management compensation.

Some two years ago when the relationship with CCA, AOR-OK and USON was unworkable, CCA gave notice to AOR-OK that the MSA was void. In response, AOR-OK filed an arbitration complaint under section 7.2(d) asking that an arbitrator alter the terms of the MSA because the economy and Medicare/Medicaid reimbursement have changed. Although the arbitration complaint requested that the MSA be reformed, AOR-OK did not seek the contract remedy of reformation.[22] AOR-OK sought a rewriting of the compensation provisions in the MSA.

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[21] The FAA, 9 U.S.C. § 2, governs agreements to settle by arbitration "a controversy thereafter arising out of such contract." The OUAA, 12 O.S.Supp.2005, § 1857 (a), governs agreements "to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement."

[22] Reformation is a contract remedy available to conform a written contract to the parties' antecedent agreement when that written contract differs from the antecedent expressions on which the parties based their agreement. *See* 15 O.S.2001, § 156. Reformation requires proof of the contract to be reformed and proof, by clear and convincing evidence, of a mutual mistake or mistake by one party and inequitable conduct on the part of the other that resulted in a written contract that did not reflect the

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The FAA reversed the longstanding judicial hostility to arbitration agreements and placed them upon the same footing as other contract provisions. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-405, n. 12-13, 87 S.Ct. 1801, 1806-1807, 18 L.Ed.2d 1270 (1967); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 (1987). Both the FAA and the OUAA require the courts to honor private parties' agreements to settle their "controversies" in the arbitral forum. The FAA and the OUAA recognize arbitration is the remedial forum agreed to by the parties as a substitute for suit in the courts. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 1652, 114 L.Ed.2d 26 (1991). The courts will not rewrite a contract for the benefit of one party, *Dismuke v. Cseh*, 1992 OK 50, ¶ 9, 830 P.2d 188, 190, and neither will the courts compel one party to submit to a substitute forum to rewrite the contract terms for the benefit of another party.[23]

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parties' intent. *Thompson v. Estate of H.H. Coffield*, 1995 OK 16, ¶ 10, 894 P.2d 1065, 1067. Reformation corrects a mistake between the written document and the actual intent of the contracting parties, but reformation does not rewrite a contract because it has become less favorable to one party due to subsequent economic changes.

[23] By this we do not mean that we would not compel interest arbitration under our collective bargaining statutes, such as 11 O.S.2001, § 51-101 et seq. Labor law recognizes two kinds of arbitration, grievance arbitration and interest arbitration. *Mulvaney Mechanical, Inc. v. Sheet Metal Workers Int'l Assoc., Local 38*, 288 F.3d 491, 494 (2nd Cir.2002). Grievance arbitration involves interpreting an existing employment contract to

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Arbitration is not a forum to rewrite a contract that has become less favorable to one party under the economy of the day.[24] We conclude, as a matter of law, that the failure of the parties to reach an agreement to amend their contract does not constitute "a

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determine whether its conditions have been breached. *Id.* Interest arbitration involves referring a dispute created by the failure of the parties to negotiate a new contract to an arbitration panel in order to establish terms and conditions of a future employment contract. *Id.*; *see Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709, 716, n. 7 (11th Cir.1987) (noting that in interest arbitration, the arbitrator writes the terms of a new contract when the employer and the employees have reached an impasse in the collective bargaining process). Interest arbitration clauses are enforceable only with respect to mandatory subjects of collective bargaining. *Mulvaney Mechanical, Inc.*, 288 F.3d at 505. "An interest arbitration clause is void as contrary to public policy to the extent that it applies to nonmandatory subjects of bargaining, *i.e.*, subjects other than wages, hours and other terms and conditions of employment; this includes the insertion of a successor interest arbitration clause in a new agreement." *Id.* Because interest arbitration deprives the parties of their right to exclude nonmandatory subjects from the collective bargaining agreement, interest arbitration is contrary to the national labor policy. *Nat'l Labor Relations Bd. v. Sheet Metal Workers Int'l Assoc., Local No. 38*, 575 F.2d 394, 399 (2nd Cir.1978). In sum, interest arbitration is contrary to the freedom of contract and generally disfavored.

[24] Our independent research did not reveal any decision dealing with a contract clause that uses binding arbitration to rewrite the contract obligations similar to section 7.2(d). Section 7.2(d) is not akin to an interest arbitration provision nor is it similar to a "favored nations" clause in a gas purchase contract calling for price re-determination based on a higher price paid in the area. *See Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 80 S.Ct. 1122, 4 L.Ed.2d 1208 (1960).

controversy arising out the contract or transaction" under the FAA or the OUAA, and the arbitration provision in section 7.2(d) of the MSA, which comes into play when the parties cannot agree to amend the MSA, is not an arbitration agreement enforceable under the FAA or the OUAA.

We turn now to section 8.6 of the MSA which requires binding arbitration of controversies, disputes and disagreements arising out of the MSA.[25] As we have already recognized, CCA and AOR-OK by assignment are parties to the MSA. Section 8.6, on its face, expresses the parties' agreement to submit controversies arising out of the MSA or the breach of the MSA to binding arbitration. However, all of CCA's claims may not arise out of the MSA or a breach of the MSA.

CCA's claims against USON relate directly to USON's conduct, its alleged wrongful non-contractual handling of CCA's financial affairs, and relate only

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[25] Section 8.6 *Arbitration* of the MSA provides:

> The parties shall use good faith negotiation to resolve any **controversy, dispute or disagreement** arising out of or relating to this Management Services Agreement or the breach of this Management Services Agreement. Any matter not resolved by negotiation shall be submitted to binding arbitration and such arbitration shall be governed by the terms of Article XI of the Purchase Agreement, which, as it applies to the parties hereto, is incorporated herein by reference in its entirety.

(Bold added.)

indirectly to the MSA.[26] CCA's claim against AOR-OK for alleged complicity in USON's alleged wrongdoing also relates directly to USON's conduct, while CCA's claim for declaratory judgment that the MSA is contrary to public policy and CCA's claim of fraud in the inducement obviously relate directly to the MSA.

Even though the plain meaning of the terms of section 8.6 provides for arbitration of disputes relating to the MSA or a breach of the MSA, AOR-OK may not be entitled to bring all of CCA's claims under section 8.6. This is so because section 8.8 contemplates that either party may file a legal action to enforce or interpret the MSA.[27] In this case, CCA seeks judicial interpretation of the MSA. Like any other contract provision, an arbitration provision will be read together with other provisions of the contract so as to give effect to the intention of the parties ascertained from the four corners of the contract. By including both these remedial provisions, it is clear that the parties did not intend that arbitration would be the exclusive remedy. The arbitration provision in

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[26] USON argues that it manages the business aspects of physician groups through its "direct and indirect subsidiaries."

[27] Section 8.8 *Enforcement* provides:

> **In the event either party resorts to legal action to enforce or interpret any provision of this Management Services Agreement,** the prevailing party shall be entitled to recover the costs and expenses of such action so incurred, including, without limitation, reasonable attorneys' fees.

(Bold added.)

section 8.6 does not preclude CCA from seeking declaratory judgment to interpret the MSA and determine the status of the parties thereunder and its conformity to the public policy of the state of Oklahoma as contemplated in section 8.8.

AOR-OK and USON contend that it is the broad language in the arbitration provision of the Purchase Agreement that clearly provides for all claims related to the MSA to be resolved in binding arbitration. It is true that section 11.01 of the Purchase Agreement expresses a sweeping arbitration scope to include contract and tort controversies arising under the Purchase Agreement.[28] Even if section 11.01 is incorporated into

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[28] Section 11.01 *Mediation and Arbitration* of the Purchase Agreement provides:

> **Any dispute, controversy or claim** (including without limitation tort claims, requests for provisional remedies or other interim relief, and issues as to arbitrability of any matter) **arising out of this Purchase Agreement,** or the breach thereof, that cannot be settled through negotiation shall be settled (a) first, by the parties trying in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association ("AAA") (such mediation session to be held in Tulsa, Oklahoma, and to commence within 15 days of the appointment of the mediator by the AAA), and (b) if the controversy, claim or dispute cannot be settled by mediation, then by arbitration administered by the AAA under its Commercial Arbitration Rules (such arbitration to be held in Tulsa, Oklahoma before a single arbitrator and to commence within 15 days of the appointment of the arbitrator by the AAA), and judgment on the award rendered by the arbitrator

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the MSA by reference in section 8.6, its arbitration scope still relates to controversies under the Purchase Agreement. The appellate record does not indicate that any of CCA's claims relate in any way to the Purchase Agreement. Further, the Purchase Agreement provides for cumulative remedies,[29] so that neither the Purchase Agreement nor the MSA gives rise to a presumption that the parties agreed that an arbitrator would have exclusive authority to interpret the contract. Generally, the courts will decide questions of arbitrability unless there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *Kaplan,* 514 U.S. at 944-945, 115 S.Ct. at 1924-1925. We leave to the district court in the first instance to decide whether any of CCA's claims against AOR-OK are within the arbitration provisions in section 8.6.

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may be entered in any court having jurisdiction thereof.

(Bold added.)

[29] Section 12.02 *Remedies No Exclusive* provides:

No remedy conferred by any of the specific provisions of this **Purchase Agreement or any other Transaction Document** is intended to be exclusive of any other remedy, and each and every remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute or otherwise. The election of any one or more remedies by any party hereto shall not constitute a waiver of the right to pursue other available remedies.

(Bold added.)

Finally, CCA opposed the motion to compel arbitration because participation in the arbitral forum under the Commercial Arbitration Rules of the American Arbitration Association is conditioned upon the payment of exorbitant arbitration fees and costs. In response, AOR-OK and USON urged that the medical physicians have sufficient funds to pay the fees and that an arbitrator might reallocate the fees among the parties at the conclusion of the arbitration proceeding. This response did not dispel the allegation of exorbitant arbitration fees and costs to be paid by CCA nor did it vitiate the need for an evidentiary hearing as to whether the costs render the arbitration provision unenforceable. *See Green Tree Financial Corp.-Alabama,* 531 U.S. at 91, n. 6, 121 S.Ct. at 522 (noting that assertions that arbitration costs are too high must be supported by proof of the costs, such as filing fees, administrative fees, and arbitrator's fees, that will in fact be imposed for the arbitration); *Bradford v. Rockwell Semiconductor Systems, Inc.,* 238 F.3d 549, 556 (4th Cir.2001) (concluding that there should be a case-by-case analysis of whether the costs of arbitration renders an arbitration agreement unenforceable).

VIII. Evidentiary Hearing on Motion to Compel Arbitration

We turn now to the procedural issue of whether the district court should have conducted an evidentiary hearing before it referred all claims to arbitration. This issue is controlled by Rule 4(c) of the Rules

for District Courts. 12 O.S.Supp.2002, ch. 2, app. Rule 4(c) requires either a hearing or a stipulation on fact issues raised on a pre-trial motion.[30] Here, CCA filed briefs with citations of authorities and affidavits and other documents in opposition to the motion to compel arbitration. CCA's filings opposing arbitration raised fact issues as to whether the arbitration fees and expenses are so excessive as to render arbitration unconscionable. CCA requested that the district court conduct an evidentiary hearing before ruling on the motion to compel arbitration. The district court did not conduct an evidentiary hearing. Without a stipulation settling the fact issues raised by CCA, the district court was duty-bound under Rule 4(c) to grant CCA's requested evidentiary hearing and allow CCA to present proof in support of its opposition to the motion to compel arbitration. Such a hearing comports with notions of procedural due process.[31] Accordingly, we find the district court clearly abused its discretion in failing to follow Rule 4(c).

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[30] Rule 4(c) of the Rules for the District Courts reads:

> Motions raising fact issues shall be verified by a person having knowledge of the facts, if possible; otherwise, a verified statement by counsel of what the proof will show will suffice **until a hearing or stipulation can be provided.**

(Bold added.)

[31] Procedural due process requires a meaningful opportunity to be heard. Okla. Const., art. 2, §§ 6 and 7; *Flandermeyer v. Bonner*, 2006 OK 87, 152 P.3d 195.

The order compelling arbitration on all of CCA's claims must be reversed and remanded. On remand, the district court must conduct an evidentiary hearing on the existence of a valid and enforceable arbitration agreement and the expense of arbitration under the Commercial Arbitration Rules of the American Arbitration Association before deciding which, if any, of CCA's claims are subject to an enforceable arbitration agreement. Should the district court determine that USON has no arbitration agreement with CCA, it must proceed to hear the merits of all of CCA's claims against USON.[32]

IX. The Original Action

We consolidated CCA's original action, No. 102,612, with the retained appeal. The relief CCA sought via this Court's writ of mandamus has been granted in this appeal, and for that reason, we would not issue the writ. However, CCA's original action

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[32] The district court must hear CCA's claims against USON that are not covered by an arbitration agreement even if CCA's claims against AOR,OK are properly referred to arbitration. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20-21, 103 S.Ct. at 939 (wherein the construction company's claims were referred to arbitration and the hospital was left to defend against the architect in state court); *Volt Info. Sciences, Inc.*, 489 U.S. at 476, n. 5, 109 S.Ct. at 1254 (noting that the FAA is not designed to deal with problems that arise in multiparty contractual disputes where some but not all parties have arbitration agreements); *see also* 12 O.S.Supp.2005, § 1858 (G) (providing that arbitration controversies may be severed from other claims).

also urged us to exercise our original jurisdiction as a court of first instance to address the issue of whether the state public policy may be circumvented by an arbitration clause.

Our state constitution, Okla. Const., art. 7, § 4, vests this Court with the discretion to exercise original jurisdiction as a court of first instance, concurrent with the jurisdiction of the district courts, as well as the authority to issue writs to the courts below. Although we may exercise original jurisdiction to entertain a case in the first instance as distinguished from our appellate jurisdiction, *Burks v. Walker,* 1909 OK 317, 25 Okla. 353, 109 P. 544, *Syllabus by the Court,* No. 3, historically, we have exercised our original jurisdiction to entertain private disputes when a great public concern is involved or if a great injury will be suffered by our failure to exercise original jurisdiction. *Jarman v. Mason,* 1924 OK 722, ¶ 20, 229 P. 459, 463, 102 Okl. 278. Otherwise, we leave the case to the jurisdiction of the district court in the first instance. *Kitchens v. McGowen,* 1972 OK 140, ¶ 6, 503 P.2d 218, 219.

We recognize the egregious nature of illegal patient-fee splitting and unlicensed practice of medicine, fraud and fraud in the inducement, and misappropriation and embezzlement as claimed by CCA. We also recognize that CCA's physicians are engaged in oncology medical practices throughout the state. However, this suit involves private litigants, private contracts, and alleged tortious conduct of private entities. We do not view this case as involving the

interests of the sovereign state over which we would assume original jurisdiction to sit as a court of first instance or otherwise requiring this tribunal of last resort to function as the trial court. Accordingly, we do not assume original jurisdiction in No. 102,612.

X. Conclusion

We conclude that the district court erred in refusing to conduct an evidentiary hearing as requested by CCA on the fact issues raised in the filings on the motion to compel arbitration. We also conclude, as a matter of law, that the arbitration provision in section 7.2(d) of the MSA is not enforceable under the FAA or the OUAA. We reverse the order dissolving the temporary stay of arbitration and compelling all claims to arbitration and remand this cause to the district court. On remand, the district court shall proceed to conduct an evidentiary hearing and, in ruling on the motion to compel arbitration, make findings of fact and conclusions of law on all issues raised by the parties. We note appellees' lately filed motion to dismiss or request for instructions. The motion to dismiss is denied. The request for instructions may be presented to the district court on remand.

ORDER COMPELLING ARBITRATION REVERSED AND CAUSE REMANDED WITH INSTRUCTIONS; ORIGINAL JURISDICTION DENIED.

WINCHESTER, C.J., EDMONDSON, V.C.J., and LAVENDER, HARGRAVE, OPALA, TAYLOR, and COLBERT, JJ., concur.

KAUGER, J., concurs in result.

WATT, J., concurs in part and dissents in part.